(1)

No. 99-99 706 AUG 2 5 1999

OFFICE OF THE CLERK

In The
Supreme Court of the United States

JOHN CANTY,
Petitioner,

v.

Hon. JANIS M. LaRHETTE *et Al.*,
Respondents.

On Petition For Writ of *Certiorari*
to the
United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

John Canty
in propria persona

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MA Att'y Reg. No. 072470

Dated: August 15, 1999.
(*n.p.t.* September 15, 1999)

SHP

Questions Presented For Review

Petitioner Canty had §§ 1441(b) and 1443 Removed a New Hampshire state court writ, which was summarily Remanded, affirmed and sanctioned by the First Circuit, yet he prevailed at (post-Remand, post-Removal appeal) state court trial.

Upon a new state court writ *in pari materia*, but not claim precluded, Respondents Vincolas prevailed, but the New Hampshire Supreme Court declined appellate jurisdiction of Canty's timely appeal of exclusively state law issues.

Upon Petitioner's subsequent First Circuit-acknowledged §§ 2201 and 1983 "General Constitutional Challenge" to both the New Hampshire statutory scheme and its Supreme Court's "decline" rule:

I. Does a state court civil defendant's *England* guarantee of the ultimate availability of federal adjudication of Removed and preserved federal Constitutional issues require successive Removals with presumably escalating appellate sanctions ?

II. May an involuntary state court civil defendant be properly (constructively) claim precluded *sub Rooker-Feldman* from the federal forum adjudication of a reserved "General Constitutional Challenge" when the sole state appellate court declined to exercise jurisdiction ?

III. If no state court, trial or appellate, was asked, or chose *sua sponte*, to address Petitioner's Removal-Noticed "General Constitutional Challenge," can it be federally precluded subsequently, or shall the Ninth, Fourth and Eleventh Circuits' *England*-based "acquiescence" doctrine obtain ?

IV. If facts, *arguendo*, support both *England* Constitutional claim reservation, or, *Rooker-Feldman* claim preclusion, yet no court, state or federal, has considered the merits of Petitioner's General Constitutional Challenge, which doctrine shall obtain ?

Parties

Petitioner:

JOHN CANTY [1],

Individually

(John F. Canty, Esq.
Massachusetts Attorney
Registration No. 072470).

Respondents:

(1) Hon. JANIS M. LARHETTE,

Individually, and Clerk,
Plaistow District Court
Plaistow, New Hampshire;

(2) Hon. HOWARD J. ZIBEL,

Individually, and Clerk,
New Hampshire Supreme Court
Concord, New Hampshire; and,

(3) L. D. AND N. L. VINCOLA,

Husband and Wife
(d/b/a "Blueberry Knoll Estates,"
Plaistow, New Hampshire),
20 Grapevine Road
Wenham, Massachusetts.

---

[1] Petitioner, reluctantly, but economically compelled, to proceed *in propria persona* below, has received representations from Member(s) of the Bar of this Honourable Court that should *certiorari* issue, suitable arrangements for Entry of Appearance on Petitioner's behalf might be reached.

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Jurisdiction

This Petition Praying issuance of Writ of *Certiorari* from this Honourable Supreme Court of the United States is respectfully submitted as founded in 28 U.S.C. §§ 1254(1) (1988) and/or 2101(c) (1988) from *en banc* denial of Rehearing and Reconsideration by the United States Court of Appeals for the First Circuit on **May 27, 1999** (A-4), upon timely application therefor from the said First Circuit (un-published) Panel Order and Judgment entered **February 25, 1999** (A-1, A-5). [2]

Statutes and Court Rules

[Citation, with text at A-45 *et seq.*]

Title 28, United States Code, §§ 1254, 1257, 1331, 1441, 1443, 1447, 1738, 2101, and 2201.

Title 42, United States Code, § 1983.

New Hampshire Revised Statutes,
Chapter 309, §§ 3 and 6;
Chapter 540, §§ 13, 20, 21, and 26.

New Hampshire Supreme Court Rules 3, 7(1), and 25(1).

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[2] This Petition was Served timely on August 25, 1999, but was deemed by the Office of the Clerk to be within Rule 14.5 necessitating revision(s) and subsequent re-Service.

Statement of the Case

The more probative judicial determinations and pleadings in this cause below have been reproduced in the Appendix, and will be integrated concisely here, as the First Circuit Court of Appeals has declined to address pivotal, perhaps dispositive, matters framing the *England*, *infra*, federal claim reservation(s) paradigm.

I. Overview.

This cause reaches this Honourable Court framing with near textbook congruence the hypothetical conflict between *England* federal court claim reservation and *Rooker-Feldman* federal court claim preclusion, upon which the several Circuits are in conflict.

This cause is of further precedential significance, as your Petitioner was initially an *involuntary state court Defendant*.

It would not be idle to infer that the underlying Constitutional claims are not without merit: otherwise, many trees have been harvested un-necessarily in avoidance of merely informing this Petitioner that his gravamen claims are un-sound.

II. The Federal Removal.

Respondent Vincola commenced a New Hampshire "Summary Process" dispossession proceeding in January, 1996, which Petitioner Canty timely Removed to the USDC-New Hampshire (A-33), asserting a "well-pleaded complaint" constrained 28 U.S.C. §§ 1431(b) and/or 1443 "General Constitutional Challenge" to New Hampshire's dual, discriminatory, statutory dispossession scheme: since 1993, only the class of New Hampshire Revised Statutes Annotated ("RSA") Chapter 509, § 6, "Ejectment" defendants are permitted access to jury trial.

The state trial court - the Plaistow (New Hampshire) District Court - duly and timely received Notice of, acknowledged of Record (A-41), and extended its comity to the federal Removal and pending General Constitutional Challenge.

The United States District Court summarily Remanded the Removed writ to the Plaistow District Court (A-42).

Upon 28 U.S.C. § 1447(d) appeal to the First Circuit, the Court affirmed the District Court Remand, and assessed $ 640.00 sanctions against Canty for a purported frivolous appeal (A-43).

Thereafter, herein Petitioner Canty, then state court involuntary Defendant, prevailed after trial on the merits in the Plaistow District Court on September 10, 1996 (A-44) [3].

III. The prior State Court proceedings.

About one (1) week later, Vincola initiated a new "Summary Process" writ (A-32); involuntary state court Defendant Canty did not, for obvious reasons, "re-Remove," but demanded state court jury trial, which was denied, following which Vincola prevailed at Bench trial.

It is conceded that no federal Constitutional issues were raised, argued, submitted to and/or decided by the same Plaistow District Court Judge (Hurd, P.J.) who had determined, in Petitioner's favor, the previously Removed and Remanded writ.

Upon Canty's timely appeal to New Hampshire's sole appellate court, the New Hampshire Supreme Court, of exclusively state law questions (A-22), that Court deemed the case not "desirable to review"... "and with no implication whatever regarding its views on the merits," *i.e.*, the Court

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[3] It is thus inaccurate and un-fair, if not offensive, to characterize federal Petitioner, as the First Circuit has, as a "state court loser (A-2/3)."

declined appellate jurisdiction (A-21).

Timely Reconsideration (A-24) joined a "new" issue, asserted as violative of the New Hampshire Constitution: whether the New Hampshire Supreme Court may arbitrarily and without any reason(s) "decline" jurisdiction of some causes implicating the New Hampshire Constitution, while "accepting" appellate jurisdiction of others of no objectively greater Constitutional moment.

Petitioner Canty pointedly (and gratuitously) re-stated the obvious to the New Hampshire Supreme Court (A-25): although he had continuously *England*-reserved, and not waived, his federal Constitutional contentions, the Court itself was not so "bound."

The New Hampshire Supreme Court declined to Reconsider its "decline," and further declined to extend the time within which Canty might seek *certiorari* in this Honourable Court (A-20), well-knowing that imminent dispossession would inevitably ensue.

IV. The Federal Court proceedings.

In late May, 1997, Canty initiated Complaint in the United States District Court, District of New Hampshire (A-11), per this Honourable Court's Rule 14.1(g)(ii), asserting:

> "JURISDICTION
>
> 6. This Honourable United States District Court is vested with Jurisdiction pursuant to Title 28, U.S.C. §§ 2201-2 ("Declaratory Judgment") over Plaintiff's Federal Claims *sub* Title 28, U.S.C. §§ 1331 and 1343(3) asserting violation(s) of Plaintiff's U. S. Constitution Amendments V, VII and/or XIV rights cognizable *sub* Title 42, U.S.C. § 1983. (A-13)."

The respective (state) New Hampshire Supreme and Plaistow

District Court Clerks, individually as well as in their official capacities, and state court Plaintiffs Vincola were named Defendants; the Complaint re-asserted Petitioner's "General Constitutional Challenge," as originally set out in the prior USDC-NH Removal (A-33), to the New Hampshire dual, discriminatory, statutory dispossession scheme, and requested a Preliminary Injunction against any state court Ordered dispossession.

The United States District Court denied the Preliminary Injunction on July 11, 1997 (A-7), and state court Ordered dispossession occurred July 18, 1997.

The First Circuit affirmed the District Court's denial of Preliminary Injunction, while rejecting Vincolas' asserted "mootness" ground (A-6).

The District Court Complaint went to Judgment on Defendants' Motions to Dismiss, with appeal subsequently taken to the First Circuit, whose supervening (un-published) Panel Order, Opinion and Judgment of February 25, 1999 (A-2; A-5), is the predicate for this Petition for *certiorari*.

The *en banc* First Circuit denied Petitioner's timely Reconsideration Application on May 27, 1999 (A-4). [4]

V. Coda.

No court, federal or state, has addressed the merits of your Petitioner's *ab initio* contention: New Hampshire's dual, discriminatory, statutory dispossession scheme offends the Constitution; the USDC-NH Magistrate-Judge, upon 28 U.S.C. § 636(b)(1)(B) Report and Recommendation adverse to Canty's Preliminary Injunction application, came the closest, observing that Petitioner Canty "... has ably raised an interesting argument about the constitutionality of New Hampshire's summary process statute...(A-8/9)."

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[4] See footnote 2, *supra*, at page 1.

Argument in Support of Allowance of Writ of *Certiorari*

I. Overview: The Rule 10(a) [and 10(c)] *Certiorari* predicate.

Petitioner Canty prays writ of *certiorari* issue to the First Circuit to review its (un-published) summary affirmance ["... although for reasons ***somewhat different*** from those relied upon below. (***emp.add.***)(A-2)."] of the USDC-NH's dismissal of Petitioner's Complaint (A-5) asserting:

(A) "General Constitutional Challenge" *sub* 28 U.S.C. § 2101 and/or 42 U.S.C. § 1983 to New Hampshire's discriminatory statutory dispossession scheme precluding (only since 1993) jury trial for "Summary Process" defendants, while continuing to allow jury trial for "Ejectment" defendants, at the possession plaintiff's remedy election; and,

(B) That the State of New Hampshire's sole appellate court, the New Hampshire Supreme Court, may not, consonant with the federal Constitution, "decline" appellate jurisdiction, literally as a collective judicial whim *sub* its Rules 3 and 7(1) (A-48) without any published *ratio*, for some, non-*de minimis*, state Constitutional causes, while accepting appellate jurisdiction *sub* its Rules 7 (plenary) or 25(1) (summary, with "... succinct statement..."; A-49) for others of indistinguishable Constitutional moment [5] [*see* Standards Relating to Appellate

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[5] "'... New Hampshire Constitution... more protective of individual rights than the... United States Constitution.'," State v. Dellorfano, 128 N.H. 628, 632-33, 517 A.2d 1163 (1986); In re Atlantic Connections, Ltd. (P.U.C.), 135 N.H. 510, 515, 608 A.2d 861 (1992).

Courts § 3.10 ("Opportunity for Appellate Review. Right of Appeal... Commentary / The right of appeal..."), at 17 *et seq.* (1994)].

No Court below has addressed (B), *supra*, nor has Petitioner waived said claim: such issue, presumably, without benefit of prior judicial consideration below, may be argued to be not ripe. [6]

It is respectfully submitted, however, that not only is this issue of the Constitutionally-arbitrary, standard-less, declination of any state appellate jurisdiction ripe here, but moreover, its insidious and un-Constitutional operation precluded this Petitioner from Standing to seek 28 U.S.C. § 1257(a) *certiorari* in this Honourable Court from the prior state court proceedings: all of Petitioner's federal Constitutional issues had been Reserved and Preserved from the New Hampshire state courts, *sub England*, *infra*, limiting any possible § 1257(a) *cert.* Petition to an argument that the "decline" of exercise of appellate jurisdiction was not an adequate or sufficient state court ground of "decision," a problematic, if not quixotic, quest at best.

Thus, the companion Complaint Count asserting federal Constitutional affront upon appellate jurisdiction decline is "inextricably intertwined" with a proper understanding and characterization of the posture of this cause: since the *Rooker-Feldman*, *infra*, claim preclusion paradigm belatedly announces the "consolation prize" of the (formerly) available § 1257(a)

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[6] Yet the claim(s) was likewise dismissed; precisely, or even imprecisely, how both the USDC-NH and the First Circuit contrived *sub silentio* to place this independent, post-trial, *Consumers Union* [Supreme Court of Virginia v. Consumers Union, 446 U.S. 719, 100 S.Ct. 1967, 64 L.Ed.2d 641 (1980)]-rooted Count within a *Rooker-Feldman* ambit remains evanescent.

cert. petition [7], rather than the now precluded, purported "second bite of the apple" in federal district court, an *England* reserving and preserving *involuntary state court defendant* is merely taunted by such an hollow, empty, and un-available remedy.

Petitioner asserts that any *Rooker-Feldman* § 1257(a) "compliance" was thus rendered impossible by New Hampshire's sole appellate court's standard-less determination to "decline" to exercise its appellate jurisdiction under Rules previously stipulated to be subject to Amendments V and XIV scrutiny (Bundy v. Wilson, 815 F.2d 125, 127 (1st Cir., 1987).

This novel, intricate, and perhaps subtle question, whether a federal General Constitutional Challenge brought subsequent to state court proceedings from which a § 1257(a) Petition would not lie, due to prior federal *England* reservations, is pivotal to this Petition, but was avoided scrupulously below.

II. Petitioner's *England* Federal Claim Reservation.

A. Involuntary State Court Defendant's *England*.

This Honourable Court has repeatedly and explicitly (*Allen v. McCurry* and *Migra*, *infra*) re-affirmed its unanimous (in Judgment) holding in England v. Louisiana Bd. of Med. Examiners, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964); this Petition seeks like explicit re-affirmation on the merits of the parallel doctrine by which an *involuntary state*

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[7] *Feldman* was decided prior to the 1988 amendment to 28 U.S.C. § 1257(a), when mandatory "appeal" jurisdiction from the highest state courts, rather than discretionary review *sub certiorari*, obtained.

court defendant shall preserve access to a federal forum for adjudication of reserved federal claims:

"...[A] party may readily forestall any conclusion that he has elected not to return to the District Court... that he intends, should the state courts hold against him on the question of state law, to return to the District Court for disposition of his federal contentions. Such an explicit reservation is not indispensable; the litigant (sic) is in no event to be denied his right to return to the District Court unless it clearly appears that he voluntarily (sic)... fully litigated his federal claims in the state courts (fn. 12 omit.). When the reservation has been made, however, his right to return will in all events be preserved (fn. 13, immediately *post*).

"13./ The reservation may be made by any party to the litigation... [T]he defendant also, by virtue of 28 U.S.C. § 1441(b), has a right to litigate the federal question there. Once issue has been joined in the federal court, no party is entitled to insist, over another's objection, upon a binding state court determination of the federal question... It may well be, of course, that a refusal to litigate or a reservation by any party will deter the state court from deciding the federal question. [supp.]."

Id., 375 U.S., at 421-22.

"12./... And if the state court has **declined** to decide the state question because of the litigant's refusal to submit without reservation the federal question as well, the District Court will have no alternative but to vacate its order... (**emp. add.**)."

Id., 375 U.S., at 421.

Two (2) points particularly relevant to this Petition emerge:

this unanimous Court fully intended that the plight of the (non-diverse) *involuntary state court defendant*, devoid of any tactical initiative or forum election (*see e.g.*, *Migra*, *infra.*), shall not be constrained to a state court adjudication of federal claims without his consent.

The other is the astute prescience of the Court in its informed speculation that the state courts, confronted with an *England* federal reservation, may well choose not to address even the state issues raised upon state court appeal: it is as if Justice Brennan's footnote 12 speculation informed the New Hampshire Supreme Court's decline of appellate jurisdiction in the antecedent state court proceedings below.

The conclusion, speculated above, must now, respectfully, appear to be compelled: as the *England* Court hypothesized possible state court decline of all appellate jurisdiction, state and federal, this Court's further astute nexus with Dist. of Columbia Ct. of Appeals v. Feldman, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983), preserving the *England* remedy against (constructive) claim preclusion, becomes explicit:

> "14./... This case is not like [*England*], which... discussed a litigant's right to reserve his federal claims for consideration by a federal court even though he might be required to inform the state court of the nature of his federal claims..."
>
> *Id.*, 460 U.S., at 480.

Thus, *England* and (*Rooker-*)*Feldman* are not properly regarded as competing, alternative, analytic paradigms, as their respective holdings explicitly teach: if a state court litigant has *England* reserved, and not subsequently abrogated the federal reservation, *Rooker-Feldman* federal preclusion, arising from a prior state court proceeding, does not, indeed can not, lie.

And absent waiver in the state courts by the *England*-

reserver, it is jurisdictionally irrelevant to the issue of ultimate federal forum adjudication of the federal claims, under both *England* and *Feldman*, what the state courts may choose to do upon state court appeal.

Pursuant to *England*'s acknowledged continuing vitality, under whose doctrine no federally reserving litigant shall be compelled to litigate federal claims in state courts, it must follow, *a fortiori*, that the same *England*-reserving litigant may not be compelled to pursue a vain § 1257(a) *cert.* application from the state courts: this hollow Rooker-*Feldman* obeisance can not be an alternative to "redeeming" the prior federal reservation in the United States District Court.

This is the analytic conclusion reached by the majority of the Circuits to address the question, and diametrically opposed to the flawed First Circuit analysis below (A-2).

B. Petitioner's strict *England* compliance.

That Petitioner, in fact, §§ 1441(b) and 1443 Removed the first New Hampshire state court writ (A-33), as instructed *sub England* and the First Circuit [Fuller Co. v. Ramon I. Gil, Inc., 782 F.2d 306, 312 (1st Cir., 1986)] is the *sine qua non* of this Petition; that the Removal was insufficient to persuade the USDC-NH (A-42) to ascertain §§ 1441(b) and/or 1443 jurisdiction, and further, incurred the judicial wrath and chill of the First Circuit (A-43), should not be permitted to derogate from Petitioner's scrupulous adherence to the *England*-mandated protocol by which an *involuntary state court defendant* may preserve ultimate access to a federal forum to hear his, now, belatedly, acknowledged by the First Circuit, General Constitutional Challenge (*cf.* A-2 with A-7 and A-43).

Indeed the irony of the foregoing should not pass un-remarked.

Again, subsequent to First Circuit sanctioned and affirmed

Remand, Petitioner prevailed in the state court (A-44).

But what if Canty had "lost" in the state court on the same state Record: would not his subsequent §§ 2201 and 1983 General Constitutional Challenge to the New Hampshire statutory scheme have been squarely within and "on all fours" with the *England involuntary state court defendant* prescription ?

So long as Canty remained "federally mute" in the state courts, which he did, and which is not contested by any Respondent [8], federal jurisdiction would have been assured [9].

The doomed Removal of the first writ, with Remand Motion requesting attorney's fees, counseled against the Re-Removal of the second, identical in cause of action, differing only in the "filled-in blanks (A-40 and A-32);" that the First Circuit had previously dispensed its view of the Removal, and the economic sanctions it imposed (A-43), predicted with near certainty that a federal district court would surely impose its own sanctions upon Re-Removal, and might have initiated professional sanctions against Canty as well:

> "Lex neminem cogit ad vana seu inutilia peragendum(a). [10]"

The state court trial Record of the second writ, as the first, is

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[8] Respondent Vincola has vaguely questioned the "formality" sufficiency of Petitioner's *England* reservation in state court, but has conceded that Petitioner never asserted any federal/ Constitutional issues in the state courts (Motion, June 13, 1997).

[9] That the district court might have then, *e.g.*, *Pullman* abstained, remitting Canty as a state court plaintiff, or, Certified the question to the New Hampshire Supreme Court, is not now relevant to the preservation of federal jurisdiction by the antecedent *England* Removal.

[10] Black's Law Dictionary 821 (5th ed., 1979).

likewise fallow of any federal issues, Constitutional or otherwise (see note 5, *supra.*); both writs were tried to the same Plaistow District Court Judge (A-44 and A-21), who might providently be assumed, in his part-time Court, to have well-known the federal Constitutional litigation un-folding external to his Court (*see*, *e.g.*, A-41).

Upon Reconsideration Request after the New Hampshire Supreme Court declined to exercise its appellate jurisdiction (A-24) over the exclusively state issues (A-22), Petitioner offered:

> "Defendant has scrupulously heretofore, and continues herein, to reserve all claims and/or theories pursuant to the Constitution of the United States, while recognizing that this Honourable Court is not similarly bound by Defendant's reservation(s). (A-25)."

Thus, it is respectfully submitted that Petitioner observed scrupulously the two (2) concomitants of the *England* reservation prescription for an *involuntary state court defendant*: (1) federal reservation by Removal, and, (2) un-broken state court silence.

Nor could the First Circuit "find" an *England* reservation waiver, indeed couching its "competing paradigm" ratio as:

> "... [E]ven if we assume arguendo that Canty was able to reserve his federal claims in state court under the doctrine of England... [supp.](A-4)."

Such judicious phrasing seemingly invites the inference that no *England* reservation waiver, in fact, occurred.

C. The Majority Circuits' *England* view.

It is not surprising not to find any reported "pure" *England*-

reserving *involuntary state court litigant* appellate decisions, when "pure *England*" is defined, as this Honourable Court prescribed, as an actual § 1441(b) Removal accompanied by consummate and continuing silence concerning the federal issues throughout the state court processes: the disposition would be dictated (*stare decisis*) by the *England* precedent.

What has emerged, however, and is very much amenable to uniform standard enlightenment from this Honourable Court, are two (2) separate threads:

(1) When there has been no antecedent federal Removal of the state court proceeding, what shall constitute a sufficient *involuntary state court defendant*'s *England* reservation ? This strand arises from this Court's *England* directive:

> "He may accomplish this by making on the state record the 'reservation to the disposition of the entire case by the state courts'... Such an **explicit reservation** is not indispensable;... (**emp.add.**)."
>
> *England*, Id., 375 U.S., at 421.

In, *e.g.*, Southern Jam, Inc. v. Robinson, 675 F.2d 94 (5th Cir., 1982), a *post-Allen v. McCurry*, *infra*, decision, the Court took pains to note that the now precluded federal plaintiff, formerly involuntary state court defendant, "... failed to raise or reserve certain collateral federal constitutional issues that arose... in state court. (Id., fn. 5, 675 F.2d, at 97.)." Yet:

> "Our decision in this case in no way questions the rule of *England*... Additionally, decisions of this court have read *England* to allow a state court defendant to reserve federal constitutional issues for subsequent federal court review. *See*, *e.g.*, *Palmer v. Jackson*... (Ibid.)."

(2) The other strain, again, also predicated upon absence of prior state court Removal, goes to "drawing the line," as it were, between "*England* reservation waiver" attendant upon submission of the federal issues for state court determination, and, merely "exposing his federal claims there... (*England, Id.*, 375 U.S., at 421)," but not "submitting" them, for state court determination.

It is significant to note that these proceedings below which frame the issues presented in this Petition, linchpinned on this former *involuntary state court Defendant*'s prior § 1441(b) Removal of the state court writ, would pass *England* federal reservation muster under **all** of the rubrics of the Majority view Circuit Courts of Appeal discussed below.

In United Parcel Svc. v. Cal. Pub. Util. Comm., 77 F.3d 1178 (9th Cir., 1996) ["*UPS-CalPUC*"], the Ninth Circuit's *post-Migra, infra, England* analysis began with ascertaining the litigational posture in state court, and found that the now federal plaintiff was an "involuntary California Supreme Court petitioner" for *England* federal reservation purposes.

The analysis does not conclude there, as *England* requires: if the federal issues were, in fact, submitted to the state court, then the *England*-reservation would have been abrogated. The Ninth Circuit held that an explicit federal reservation footnote on the first page of petitioner's nine (9) page motion was an *England*-sufficient reservation, but not too "sufficient" to constitute waiver [11].

This Honourable Court has recently considered the Second Circuit's leading *England* authority, Hickerson v. City of New York, 146 F.3d 99 (2nd Cir.), *cert. den.* __U.S.__, 119 S.Ct.

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[11] The Ninth Circuit's due process analysis of the claim preclusive effect to be ascribed to state appellate courts' decline of jurisdiction, *Id.*, at 1187-88, is also probative of this Petition at 6 *et seq., supra.*

795, 142 L.Ed.2d 658 (1999), arguably a "late moot reservation" case, where the Court set out *verbatim* the *England* prescription for *involuntary state court defendants* (*Id.*, at 111), and observed, "... we believe that it is clear, in context, that this footnote was only intended to clarify that *England* applies to defendants as well as plaintiffs... (*Id.*, at 112.)."

Previously, and as cited by the Second Circuit in *Hickerson, supra*, the Eleventh Circuit construed *England* after this Court's *Migra, infra*, decision:

> "The *Migra* Court made clear that *England* could apply when a litigant with a federal constitutional claim is **involuntarily** in state court. *Migra*, 465 U.S. at 85 n. 7... (**emp.add.**)."
>
> Fields v. Sarasota Manatee Airport Auth., 953 F.2d 1299, 1304 (11th Cir., 1992); *accord*: *UPS-CalPUC*, *Id.*, 77 F.3d, at 1185.

The *Sarasota Manatee* Court, however, signaled clearly its unwillingness to be gulled by a non-Removing, otherwise "*Migra*-exempt," involuntary state court litigant, purporting a "tacit" *England* federal reservation:

> "Attempting to silently reserve federal issues by failing to raise them... is clearly insufficient to preserve federal court review of un-raised constitutional issues."
>
> *Id.*, 953 F.2d, at 1309.

In an interesting variation of the classical *England* scenario also recently before this Honourable Court, the Fifth Circuit, in Samaras v. America's Fav. Chicken Co./Matter of Al Copeland

Enterprises, Inc., 153 F.3d 268 (5th Cir.), *cert. den.* __U.S.__, 119 S.Ct. 1251, 143 L.Ed.2d 348 (1999), focused seemingly *sub silentio* on the *Allen v. McCurry*, *infra*, "fully litigated" in state court requirement as an essential pre-condition to the imposition of subsequent federal claim preclusion:

> "When... the cognizant state courts **expressly refuse** to consider the federal issues in the case... the litigant has not waived his right to return to federal court. (**emp.add.**)."
>
> *Id.*, 153 F.3d, at 271.

The *Samaras* Court had invoked the Fourth Circuit's *England* jurisprudence as articulated in Front Royal v. Town of Front Royal, VA, 135 F.3d 275 (4th Cir., 1998) in support of its "state courts' *England* federal reservation acquiescence" doctrine; the *Front Royal* Court, in turn, had plumbed its "acquiescence" view informed by Third Circuit precedent [Ivy Club v. Edwards, 943 F.2d 270 (3rd Cir.), *cert. den. sub nom* Del Tufo v. Ivy Club, 503 U.S. 914, 112 S.Ct. 1282, 117 L.Ed.2d 507 (1992)], and expressed it as:

> "We see no warrant for finding a voluntary waiver of ***England*-type rights** where, although a reservation was not expressly made, the state court expressly refuses to reach the federal claims presented to it out of concerns for comity. (**emp.add.**)."

Id., n.4, 135 F.3rd, at 283-284; *accord*: Bradley v. Pittsburgh Board of Ed., 913 F.2d 1064, 1072 (3rd Cir., 1990).

These latter, *post-Migra*, *infra*, Circuit considerations seemingly adopt, *sub silentio*, a "migration" away from current claim preclusion doctrine even for § 1983 federal plaintiffs also

cast as "involuntary state court plaintiffs," holding that if the state courts, *arguendo*, extend *England* reservation comity, as tested by their silence, then the federal courts may, if not must, subsequently entertain the federal claims without risk of comity or 28 U.S.C. § 1738 full faith and credit affront.

Well worthy of the express *imprimatur* of this Honourable Court, this "*England* reservation acquiescence" doctrine is properly applicable to all *England*-reserving *involuntary state court litigants* as well, for identical policy reasons: state court comity has been extended, and declined.

See also Daniel R. Coquillette *et al.*, 18 Moore's Federal Practice 3rd, § 133.53[2] (supp. 1997); Charles Alan Wright *et al.*, 18 Federal Practice and Procedure: Jurisdiction and Related Matters, § 4471.1, n. 26 (supp. 1999).

D. The First Circuit's erroneous view.

It is mildly disconcerting that the First Circuit declined to Notice, nor attach appropriate doctrinal significance to, the Parties' two (2) previous "trips" to its storied, and now new, venue. In the first (A-43), herein Petitioner had gamely set about following the *England* federal reservation prescription for *involuntary state court defendants*: Removal.

The Removal Petition (A-33), constrained by the well-pleaded Complaint doctrine not contemplated within the *England* fn. 13 paradigm for involuntary state court defendants, is, respectfully, clear: Petitioner Canty sought a federal forum determination that jury trial, which was available to all New Hampshire dispossession defendants prior to 1993, but now was denied only to the class of "summary process" defendants, was Constitutionally offensive.

Neither the Removal Court (A-42) nor the First Circuit, respectfully, afforded the Removal Petition a fair reading.

The Parties' next First Circuit docket appearance was

occasioned by herein Petitioner's application for emergency injunction, entered July 31, 1997 (First Circuit Docket No. 97-1856), in advance of the imminent state court dispossession Order, and summarily denied (A-6).

While the latter First Circuit "consideration" seemingly eviscerates that Court's § 2201 absence of Standing thesis, considered *infra*, the former Removal appeal, however ill-advised, surely must not be construed as frivolous to the perfection of the *England* federal claims reservation, when the USDC-NH summarily declined to even acknowledge a "federal question (A-42)."

Properly inferring that the First Circuit in fact had ample Notice and knowledge of Petitioner's continuing *England* federal reservation not later than the time it sanctioned the Removal appeal (A-43), the Panel Order may be deconstructed to its, respectfully, erroneous essence:

(1) The First Circuit holds that *England* federal claim reservation and *Rooker-Feldman* federal claim preclusion are "policy fungible" doctrines. The majority of its sister Circuits, as well as this Petitioner, as considered above, demur: if there has been a sufficient *England* reservation, and if it has been preserved, and not abrogated, the inquiry is concluded, and the federal forum, for an involuntary state court litigant, is available for determination of the federal claims.

(2) Notwithstanding the foregoing, the First Circuit, upon its "fungibility" thesis, has <u>always</u> opted for claim preclusion, and was not persuaded to deviate therefrom below.

The sole possible theoretical deviation from the "pure *England*" federal claim reservation paradigm upon which the First Circuit, *sub silentio*, might have seized, is Petitioner's declination to "Re-Remove" the latter state court writ, perhaps not sufficiently crediting the chilling import of the sanctions it

imposed upon Petitioner's first Removal.

Nothing else can distinguish away *England*'s congruent application here.

III. § 1983 and Claim Preclusion.

In Allen v. McCurry, 449 U.S. 90, 101 S.Ct. 441, 66 L.Ed.2d 308 (1980), this Honourable Court addressed whether the same nuclear facts ("search") might be re-litigated in the federal courts as an § 1983 civil rights claim after the state courts, in a criminal context, found no illegality, and concluded that traditional principles, now characterized as issue and claim preclusion, shall apply.

Significant to this Petition is:

> "Contrary to a suggestion in the dissenting opinion..., this case does not involve the question whether a § 1983 claimant can litigate in federal court an issue he might have raised but did not raise in previous litigation. (emp.add.)."
>
> Id., n. 5, 449 U.S., at 94.

Allen v. McCurry, then, is not available for the proposition that this Court has authorized "constructive Constitutional claim preclusion." This holding is, of course, consistent with the holding in *Feldman*: while many still dispute what claims in fact, or even in theory, survived the prior "state court" *Feldman* litigation, without putting too fine a point on it, something termed a General Constitutional Challenge survived, and significantly here, was not to be "constructively" claim precluded subsequently in the federal district court.

The *Allen v. McCurry* Court also observed pointedly:

"The *England* decision is inapposite to the question before us."

Id., n. 17, 449 U.S., at 101.

This "constructive Constitutional claim preclusion" issue left open in *Allen* was reached in Migra v. Warren City School Dist. Board of Ed., 465 U.S. 75, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984); there, after Ohio *state court voluntary Plaintiff* Dr. Migra had successfully won employment re-instatement and compensatory damages in the Ohio state courts, an unanimous Court held that her subsequent *voluntary Plaintiff*'s § 1983 federal claim may be precluded, if it would be, or would have been, precluded under Ohio state law by the Ohio state courts.

Stated alternatively, a federal district court is required by 28 U.S.C. § 1738 to inquire whether a § 1983 claim before it may be barred by previous litigation according to the state court law of the forum [12], and the *Migra* Court remanded for a first instance interpretation of Ohio preclusion law.

Such an inquiry concerning this Petition is significantly less tortured. New Hampshire claim preclusion law is straight-forward:

(A) In the first instance, New Hampshire Supreme Court Rule 3 defines the import, and hence the preclusive effect, if any, to be accorded a Rule 7(1) "decline" of appellate jurisdiction: "... no implication whatever regarding its views on the merits. (A-48)."

(B) In Taylor v. Nutting, 133 N.H. 451, 578 A.2d 347 (1990), the New Hampshire Supreme Court held that neither "Law of the Case" nor *res judicata*, broadly embracing

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[12] No such inquiry was undertaken below by the USDC-NH, nor by the First Circuit.

constructive claim preclusion, can attach "... where the issue before the court was not 'fully briefed and squarely decided'... (Id., 133 N.H., at 454)."

It is clear from the foregoing that the state courts of New Hampshire would ascribe no subsequent preclusive effect upon the New Hampshire Supreme Court's decline of appellate jurisdiction under that Court's own Rules and precedent, without even reaching the *Allen v. McCurry* due process requirement of "... a full and fair opportunity to litigate... (Id., 449 U.S., at 104.)."

Since Petitioner might have brought a New Hampshire state court § 1983 claim immune from a preclusion defense arising from the prior state court summary process proceeding, there is no *Migra* basis for federal preclusion of the identical federal claim.

It might also be well-noted that the *Migra* Court re-affirmed, as the Ninth (*UPS-CalPUC*, Id., 77 F.3d, at 1185.) and the Eleventh (*Sarasota Manatee*, Id., 953 F.2d, at 1304.) Circuits have pointed out, *England*'s continuing vitality (*Migra*, Id., fn. 7, 465 U.S., at 85.).

Finally, as this Honourable Court has refined in recent Terms our structural and Eleventh Amendment jurisprudence, it has had occasion to reconsider the breadth of the traditional doctrine first expressed in Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908) concerning the amenability of state officers, individually, to prospective federal declaratory and/or injunctive relief. This past Term, in Alden v. Maine, __U.S.__, 119 S.Ct. 2240, 144 L.Ed.2d 2240 (1999), this Court observed, as relevant to this Petition:

> "Some suits against state officers are barred by the rule that sovereign immunity is not limited to suits which name the State as a party... The rule, however, does **not** bar certain

> actions against state officers for injunctive or declaratory relief... Even a suit for money damages may be prosecuted against a state officer in his individual capacity for unconstitutional or wrongful conduct fairly attributable to the officer himself...(**emp.add.**)."
>
> *Id.*, __U.S., at __, 119 S.Ct., at 2267.

This *Alden* Court significantly, as the above extract intends to import, has acknowledged the Constitutional remove of our Fifth and Fourteenth Amendments from generic Tenth or Eleventh Amendment proscriptions, and the Congress' enabling legislation thereunder, *e.g.*, 42 U.S.C. § 1983 (1996), as invoked by this Petitioner in remedy of asserted continuing New Hampshire Constitutional violation(s), shall continue to be available. [13]

IV. Petitioner's strict *Rooker-Feldman* compliance.

While placing principal Petition reliance upon the *involuntary state court defendant*'s perfected *England* federal claim reservation by Removal, and subsequent preservation from the state courts, of the federal General Constitutional Challenge(s), no *Rooker-Feldman* claim preclusion bar arises even *arguendo*, contrary to the First Circuit's holding below (A-4).

A threshold consideration in examining Petitioner's successful avoidance of the *Rooker-Feldman* preclusion snare

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[13] *Quaere*, does not explicit ratification of the Constitution on June 21, 1788, by the ninth and pivotal sovereign state, and/or its subsequent explicit ratification on January 25, 1790, of Amendment VII, *inter alia*, constitute an "*Alden* sovereignty surrender" of minimal civil jury trial availability ? *See* Verified Complaint, ¶ 14, *infra*, at A-14/15.

arises from its sometimes characterization as a "jurisdictional bar," or as this Honourable Court has more recently held, an "abstention doctrine [Johnson v. DeGrandy, 512 U.S. 997, 1005, 114 S.Ct. 2647, 2654, 129 L.Ed.2d 775, 787 (1994)]:" under either construct, it is pivotal to ascertain whether there was an *Allen*-sufficient, prior state court final [14] judgment. That question here can only be answered in the negative upon the New Hampshire Supreme Court's "decline" of appellate jurisdiction (A-21).

It follows then *a fortiori* that absent a state court *Allen v. McCurry* "final judgment" preclusion predicate, there can be no subsequent federal "constructive" preclusion *sub Rooker-Feldman* (or, *Migra*). While all causes and claims actually litigated in the state court would, of course, be precluded, Petitioner's acknowledged federal General Constitutional Challenge, which was never raised or considered in the state courts, moreover, was previously "reserved" from the state courts by Removal, may not now be precluded. [15]

The Sixth Circuit, in Catz v. Chalker, 142 F.3d 279 (6th Cir., 1998), has examined the application of *Rooker-Feldman* claim preclusion principles in subject matter (domestic relations), as here (landlord-tenant), only infrequently before the federal

---

[14] It might be well-noted how the First Circuit skirted Petitioner's derivative Constitutional question concerning the New Hampshire Supreme Court's "decline" of appellate jurisdiction, "... upheld by the judgment of the state court (sic)...(A-2)," begging the question pivotal to this Petition, whether an appealed, but jurisdiction-avoided, judgment of a limited jurisdiction, part-time, state trial court can be *Allen*-sufficient to support subsequent federal claim preclusion; quite simply, it may not.

[15] "...[E]xtreme application of state-law res judicata principles violates the Federal Constitution. [supp.]." Richards v. Jefferson County, 517 U.S. 793, 804, 116 S.Ct. 1761, 1769, 135 L.Ed.2d 76, 88 (1996).

courts, as historically considered "local" in nature.

The *Catz* Court straightforwardly applied Justice Marshall's litmus from Pennzoil v. Texaco, Inc., 481 U.S. 1, 25, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987) (MARSHALL, J., concurring):

> "...[T]he federal claim is inextricably intertwined with the state court judgment if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it. [supp.]."

The *Catz* Court then concluded:

> "Catz's due process allegation does **not** implicate the merits of the divorce decree, **only the procedures leading up to it** (fn. omit.). For him to seek federal relief on this score need not be 'predicated upon a conviction that the state court was wrong' on the merits... [R]elief for Catz's due process claim would not consist of a conflicting judgment on the merits...
>
> ...
>
> "Thus, permitting jurisdiction in this case does not contravene the heart of the *Rooker-Feldman* doctrine, the prohibition of reviewing the **substance** of state court judgments. (**emp.add.**)[supp.]."
>
> *Id.*, 142 F.3d, at 294.

It is difficult, if not high sophistry, to avoid finding congruence between *Catz* and this Cause: Petitioner seeks federal Constitutional Equal Protection remedy for New Hampshire's denial of jury access to one class of dispossession defendants, and most emphatically, as in *Catz*, not collateral review of the merits of a particular state court judgment.

The First Circuit's *Rooker-Feldman* "compound error" below, respectfully, may be framed:

(A) The *England* and *Rooker-Feldman* doctrines are not fungible, as a matter of policy, but require first, an *England* federal reservation analysis, and only then, after concluding no perfected reservation and preservation from the state courts, shall a *Rooker-Feldman* preclusion inquiry ensue; and,

(B) Petitioner's General Constitutional Challenge survived preclusion, attributable either to the antecedent federal reservation by Removal, or, by the New Hampshire Supreme Court's decline of appellate jurisdiction, or both conjunctively.

Thus, the First Circuit errs both in theory and in "authority:"

> "Finally, even if we assume arguendo that Canty was able to reserve his federal claims in state court under the doctrine of England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964), we nonetheless find, essentially for the reasons given by the court in Szoke v. Carter, 974 F.Supp. 360, 366 (S.D.N.Y. 1997), that the England reservation does not overcome a Rooker-Feldman jurisdictional bar in this case. (A-4)."

Petitioner submitted, upon application for *en banc* Rehearing, that the First Circuit's reliance upon *Szoke v. Carter*, *supra*, was misguided insofar as that Court, in fact, held:

> "I accordingly find that the *Rooker-Feldman* doctrine **does not bar** plaintiff's First Amendment claims. (**emp**.**add**.)."
>
> *Szoke*, *Id.*, 974 F.Supp., at 366.

Conclusion

WHEREFORE all of the foregoing, Petitioner respectfully requests that Writ of *Certiorari* issue to the United States Court of Appeals for the First Circuit in Docket Number 98-1671, and upon consideration hereof, this Honourable Court Reverse and Remand the Judgment Entered therein on February 25, 1999.

Petitioner respectfully submits the following succinct Rules 10(a) and 10(c) compelling reasons, as previously considered in detail, *supra*, for the Relief above Prayed:

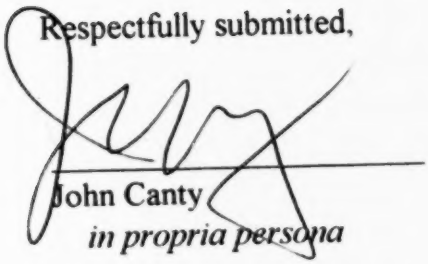
I. There exists Circuit conflict, as considered *supra*, in the application of this Honourable Court's *England* doctrine post-*Migra* concerning:

(a) Which litigants, plaintiffs and/or defendants, voluntary or involuntary, may avail of *England*;
(b) Whether federal jurisdiction must first attach prior to any state court proceedings for *England* availability; and,
(c) The form of reservation sufficient to avail subsequently of a federal adjudication *sub England*.

II. There exists Circuit conflict, as considered *supra*, in the application of this Honourable Court's *Rooker-Feldman* doctrine, also post-*Migra* concerning:

(a) The necessity of a threshold state law *Migra*-prescribed 28 U.S.C. § 1738 claim preclusion inquiry; and,
(b) The nature of sufficient state court appellate consideration, if any, to be found before subsequent claim preclusion shall permissibly attach.

Respectfully submitted,



John Canty
in propria persona

MA Att'y Reg. No. 072470

Wshtn.Sq./POB 6346
Haverhill, MA 01831-6346
978.521.8888

Dated: August 15, 1999.

[Revised *sub* Rule 14.5 *nunc pro tunc*
September 15, 1999: *see* footnote 2 at 1., *supra*.]

[NOT FOR PUBLICATION--
NOT TO BE CITED AS PRECEDENT]

United States Court of Appeals
For the First Circuit

No. 98-1671

JOHN CANTY,
Plaintiff, Appellant,
v.
JANIS M. LARHETTE, ETC., ET AL.,
Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF NEW HAMPSHIRE

[Hon. Steven J. McAuliffe, U.S. District Judge]

Before

Stahl, Circuit Judge,
Coffin, Senior Circuit Judge,
and Lipez, Circuit Judge.

John Canty on brief pro se.

Philip T. McLaughlin, Attorney General, and Daniel J. Mullen, Senior Assistant Attorney General, on brief for appellees Janis Larhette and Howard Zibel.

James B. Kazan and Normand & Shaughnessy, P.A. on brief for appellees L. David Vincola and N.L. Vincola.

February 25, 1999

Per Curiam. Having carefully reviewed the record in this case, including the briefs of the parties, we affirm the dismissal of appellant's claims, although for reasons somewhat different from those relied upon below.

First, we find all of Canty's claims for damage relief to be barred by the doctrine of Rooker-Feldman. Each of these claims is predicated on an alleged injury which arises out of Canty's eviction. Since that eviction was upheld by the judgment of the state court, Canty's "federal claim [for damage relief] succeeds only to the extent that the state court wrongly decided the issue before it and hence is "inextricably intertwined" with the state court judgment. Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 25 (Marshall, J., concurring); see, e.g., Garry v. Geils, 82 F.3d 1362, 1367 (7th Cir. 1996) ("defendant who has lost in state court and sues in federal court . . . asserts injury at the hands of the court and . . . suit therefore is an effort to obtain collateral review"); Homola v. McNamara, 59 F.3d 647, 651 (7th Cir. 1995) (suit against deputy for enforcing court order is "just a way to contest the order itself" and thus barred by Rooker-Feldman).

Arguably, Canty is correct in his contention that his claims for declaratory and injunctive relief are general constitutional challenges to a state statute and hence not barred by the Rooker-Feldman doctrine. See Schneider v. Colegio de Abogodos de Puerto Rico, 917 F.2d 620, 628 (1st Cir. 1990) (Rooker-Feldman does not bar facial challenges to state statutes). Nevertheless, absent an allegation of injury from the eviction--allegations as we have just indicated which are barred by the Rooker-Feldman doctrine--Canty fails to show the concrete injury necessary to establish his standing to seek injunctive or declaratory relief. See Berner v. Delahanty, 129 F.3d 20, 24 (1st Cir. 1997) (party seeking solely injunctive or declaratory relief only has standing to pursue his claim if he can show, inter alia, invasion of legally protected concrete interest),

cert. denied, 118 S. Ct. 1305 (1998); see also Landers Seed Co., Inc. v. Champaign Nat. Bank, 15 F.3d 729, 732 (7th Cir.) (absent claim for damages, plaintiff lacks standing to sue for declaratory and injunctive relief; however, pursuing damages essentially asks court to invalidate state court judgment and hence is barred by Rooker-Feldman), cert. denied, 513 U.S. 811 (1994).

Finally, even if we assume arguendo that Canty was able to reserve his federal claims in state court under the doctrine of England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964), we nonetheless find, essentially for the reasons given by the court in Szoke v. Carter, 974 F. Supp. 360, 366 (S.D.N.Y. 1997), that the England reservation does not overcome a Rooker-Feldman jurisdictional bar in this case.

Affirmed. See 1st Cir. Loc. R. 27.1.

United States Court of Appeals
For the First Circuit

No. 98-1671

JOHN CANTY,
Plaintiff, Appellant,
v.
JANIS M. LARHETTE, ETC., ET AL.,
Defendants, Appellees.

Torruella, Chief Judge,
Coffin, Senior Circuit Judge,
Selya, Boudin, Stahl, Lynch and Lipez, Circuit Judges.

ORDER OF COURT
Entered: May 27, 1999

Appellant's "petition for rehearing with suggestion of en banc rehearing of this court's judgment," dated February 25, 1999, is denied.

By the Court:

PHOEBE MORSE
Clerk.

[cc: Messrs. Canty, Kazan and Mullen]

United States Court of Appeals
For the First Circuit

No. 98-1671

JOHN CANTY,
Plaintiff, Appellant,

v.

JANIS M. LARHETTE, ETC., ET AL.,
Defendants, Appellees.

JUDGMENT

Entered: February 25, 1999

This cause came on to be submitted on the briefs and original record on appeal from the United States District Court for the District of New Hampshire.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed. See 1st Cir. Loc.R. 27.1.

By The Court:

PHOEBE MORSE, CLERK

By: (Stamp) JANICE M. O'NEIL
Chief Deputy Clerk

[cc: Hon. Steven J. McAuliffe, Jim Starr, Clerk, USDC
Messrs. Canty, McLaughlin, Kazan]

United States Court of Appeals
For the First Circuit

No. 97-1856

JOHN CANTY,
Plaintiff, Appellant,

v.

JANIS M. LARHETTE, ET AL.,
Defendants, Appellees.

Before

Torruella, Chief Judge,
Boudin and Stahl, Circuit Judges.

ORDER OF COURT

Entered August 21, 1997

Substantially for the reasons stated in the magistrate-judges's June 23, 1997 report and recommendation, we deny appellant's motion for emergency injunctive relief and summarily affirm the judgment denying preliminary injunctive relief. Loc. R. 27.1. Affirmed.

By the Court:
VINCENT F. FLANAGAN,
Acting Clerk.

By: (STAMP)
Janice M. O'NEIL
Chief Deputy Clerk.

[cc: Messrs. Canty and Kazan]

United States District Court
District of New Hampshire

John Canty,
Plaintiff

v. Civil No. 97-262-M

Janis M. LaRhette;
Howard J. Zibel;
L.D. Vincola; and N.L. Vincola;
Defendants

ORDER

The Magistrate Judge's Report and Recommendation (document no. 10) is approved and adopted for the reasons set out in the report. Accordingly, plaintiff's application for a preliminary injunction is hereby **DENIED**.

SO ORDERED.

/s/_____
Steven J. McAuliffe
United States District Judge

July 11, 1997

cc: John Canty
James B. Kazan, Esq.

(Time Stamp: U.S. DISTRICT COURT
DISTRICT OF N.H.
FILED
Jun 23 2 11 PM '97)

United States District Court
District Of New Hampshire

John Canty

v. Civil No. 97-262-M

Janis M. LeRhette (sic), et al.

Report and Recommendation

Plaintiff John Canty, who unsuccessfully defended a summary process eviction proceeding in state court, now challenges, on federal constitutional grounds, the unavailability of a jury trial in New Hampshire summary process eviction proceedings. He also challenges, again on federal constitutional grounds, New Hampshire Supreme Court Rule 7(l), insofar as that rule permits the New Hampshire Supreme Court to decline to answer New Hampshire constitutional questions presented on appeal.

Relying on his unavailability-of-jury-trial claim, plaintiff has applied for a preliminary injunction enjoining the landlord defendants -- L.D. and N.L. Vincola -- from seeking and obtaining a Writ of Possession from the Plaistow District Court. Judge McAuliffe has referred this application to me for a report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B). After carefully reviewing the application, I recommend that it be denied without a hearing.

Although plaintiff has ably raised an interesting argument about the constitutionality of New Hampshire's summary process statute, it is clear that his argument could have been raised as a defense in the state proceedings. Accordingly, the argument will likely founder on principles of res judicata. See, e.g., Lovely v. Laliberte, 498 F.2d 1261, 1263 (lst Cir.) (affirming dismissal of a 42 U.S.C. § 1983 action, the basis of which could have been asserted as a defense in an already concluded state court eviction proceeding), cert. denied, 419 U.S. 1038 (1974). Accordingly, injunctive relief based on this claim would be inappropriate. See Gately v. Commonwealth of Mass., 2 F.3d 1221, 1224-25 (lst Cir. 1993) (injunctive relief should not issue where the claim on which it is sought is not likely to succeed), cert. denied, 511 S. Ct. 1082 (1994).

Having recognized all along the potential res judicata defense he would face in this court should he lose in state court, plaintiff asserts that, per a dictum in Lovely, see 498 F.2d at 1263-64 ("It is possible that a parallel reservation might preserve a federal constitutional defense and counterclaim in a state possession action. But the proper procedure would be for the defendant to notify the state court that he was preserving the issue. Lovely did not do so, and therefore cannot escape the ordinary effect of res judicata.") and by analogy to England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 413-15 (1964) (permitting federal plaintiffs who are "abstained out" to the state courts to reserve their right to return to federal court and litigate their federal claims in the event that the state proceedings are resolved against them), he explicitly reserved his federal defenses in state court. He further contends that such a reservation is sufficient to defeat a res judicata defense. The problem with this is that the Supreme Court has strongly indicated that England reservations are permissible only in abstention situations, where the first action initiated is the federal one.

See Allen v. McCurry, 449 U.S. 90, 101 n.17 (1980); see also Partido Nuevo Progesista v. Barreto Perez, 639 F.2d 825, 826 n.2 (1st Cir. 1980) (expressing doubt about the correctness of the Lovely dictum in light of McCurry), cert. denied, 451 U.S. 985 (1981).

McCurry's indication along these lines is persuasive. Outside of an abstention context (where the federal action is the first one initiated), the hostility toward claim splitting which animates the res judicata doctrine; the inconsistency of the regime plaintiff suggests with the well-pleaded complaint rule (which generally precludes removal on the basis of federal defenses); and the limited availability of removal in civil rights cases, see 28 U.S.C. § 1443, all militate in favor of requiring a defendant to raise his federal defenses in state court. See Godoy v. Gullotta, 406 F. Supp. 692, 694 (S.D.N.Y. 1975). Clearly, plaintiff did not do so, and is therefore likely subject to a valid res judicata defense.

Because plaintiff has not demonstrated a likelihood of eventual success on the claim underlying his application for injunctive relief, I recommend that the application be denied. Any objection to this report and recommendation must be filed within ten days of receipt of this notice. Failure to file an objection within the specified time waives the right to appeal the district court's order. See Unauthorized Practice of Law Comm. v. Gordon, 979 F.2d 11, 13-14 (1st Cir. 1992); United States v. Valencia-Copete, 792 F.2d 4,6 (1st Cir. 1986).

/s/_____
James R. Muirhead
United States Magistrate Judge

Date: June (script:23), 1997

cc: John Canty, pro se

In the United States District Court for the District Of New Hampshire

CONCORD, ss: Civil Action Number: CV-97- 262 - Mc

CLAIM OF UNCONSTITUTIONALITY
JURY DEMAND

JOHN CANTY,)
Plaintiff,)
v.) VERIFIED COMPLAINT
Hon. JANIS M. LaRHETTE,)
Individually,)
Hon. HOWARD J. ZIBEL,)
Individually, and,)
L. D. and N. L. VINCOLA,)
Defendants.)

To The Honourable The Judges Of The United States District Court For The District Of New Hampshire:

RESPECTFULLY REPRESENTS your Plaintiff as above-captioned, JOHN CANTY, as and for VERIFIED COMPLAINT as follows:

PARTIES

PLAINTIFF:

1. JOHN CANTY, Plaintiff as above-captioned, is a Citizen and domiciliary of the State of New Hampshire and of these United States, residing at the rental real estate premises known as and numbered as Unit C-10, 19 Newton Road, Plaistow, Rockingham County, and, is the Defendant in Plaistow (New Hampshire) District Court Docket Number 96-LT-82.

DEFENDANTS:

2. DEFENDANT Hon. JANIS M. LaRHETTE is, and was at all time relevant hereto, the Clerk of the Plaistow (New Hampshire) District Court, a sworn State of New Hampshire public Official acting under color of the State of New Hampshire Constitution and its statute(s), and is subject to the Constitution of the United States, but without immunity for her action(s) or omission(s) pertinent to this Cause, which said acts and/or omissions are ministerial in nature, and without the exercise of discretion, in attendance upon the Order(s) of her Court, Hon. PETER G. HURD, Presiding Justice.

2(a). Said Defendant LARHETTE knew, or should have known, that her said act(s) or omission(s), and conspiracy with other herein named DEFENDANTS, resulted in and violated Plaintiff's Federally secured Constitutional rights.

3. DEFENDANT Hon. HOWARD J. ZIBEL is, and was at all time relevant hereto, the Clerk of the New Hampshire Supreme Court, a sworn State of New Hampshire public Official acting under color of the State of New Hampshire Constitution and its statute(s), and is subject to the Constitution of the United States, but without immunity for his action(s) or omission(s) pertinent to this Cause, which said acts and/or omissions are ministerial in nature, and without the exercise of discretion, in attendance upon the Order(s) of his Court, Hon. DAVID A. BROCK, Chief Justice.

3(a). Said Defendant ZIBEL knew, or should have known, that his said act(s) or omission(s), and conspiracy with other herein named DEFENDANTS, resulted in and violated Plaintiff's Federally secured Constitutional rights.

4. DEFENDANTS L. D. and N. L. VINCOLA (hereinafter, "Vincola"), Husband and Wife, are Citizens and domiciliaries of the Commonwealth of Massachusetts residing at 20 Grapevine Road, Wenham, Essex County, "own" the said premises occupied by Plaintiff, and seek immediate possession thereof in said Plaistow Docket Number 96-LT-82.

4(a). Said Defendant VINCOLAS are "State Actors" acting "Under Color of State Law," as said terms have attained Constitutionally significant moment and meaning, herein and hereunder.

5. Plaintiff reserves Leave hereby to name further Defendant(s), including Hon. Peter G. Hurd, Presiding Justice of said Plaistow District Court, and, Hon. David A. Brock, Chief Justice of the New Hampshire Supreme Court, as the reach and/or Constitutionality of the 1996 Amendment to 42 U.S.C. § 1983 may more clearly appear.

JURISDICTION

6. This Honourable United States District Court is vested with Jurisdiction pursuant to Title 28, U.S.C. §§ 2201-2 ("Declaratory Judgment") over Plaintiff's Federal Claims sub Title 28, U.S.C. §§ 1331 and 1343(3) asserting violation(s) of Plaintiff's U. S. Constitution Amendments V, VII and/or XIV rights cognizable sub Title 42, U.S.C. § 1983.

ALLEGATIONS OF RELEVANT FACT

7. The State of New Hampshire maintains two (2) separate and distinct statutory schemes by which an occupant of real property ("tenant") may be dispossessed ("evicted"): by "Writ of Ejectment" sub N.H. RSA 509:6 or by "Summary Process Writ" sub N.H. RSA 540:12; their independent existence is not a "Legislative oversight," but is perpetuated sub RSA 540:26.

8. A "Writ of Ejectment" is "returnable" in the Superior Court, where a defendant has access to Trial by Jury; a "Summary Process Writ" is returnable in the District Court, where Trial by Jury is not available. Prior to January 1, 1993, a Summary Process defendant aggrieved by a determination of the District Court might "appeal" to the Superior Court for Trial de novo with access to Trial by Jury.

9. New Hampshire General Court 1992 Session Laws c. 284:45, effective January 1, 1993, amended RSA 540:20 to abrogate said "appeal" with Trial de novo, and access to Trial

by Jury, for "Summary Process" defendants; no such abrogation of access to Trial by Jury was imposed upon "Ejectment" defendants.

10. Since 1993, all New Hampshire "Summary Process" defendants are denied access to jury trial, while "Ejectment" defendants are afforded access to jury trial, which "class determination" is made solely and exclusively upon plaintiff's standard-less remedy election. The aforesaid statutory scheme is discriminatory against "Summary Process" defendants as a classification which denies its members access to jury trial and is without valid or rational State purpose.

11. There is no State of New Hampshire purpose which can support, under Equal Protection Clause "strict scrutiny" review, "rational relation" review, and/or a "mid-level" review, this denial of the Fundamental Right of access to Jury Trial to the class of "Summary Process" defendants while affording access to jury trial to the class of "Ejectment" defendants.

12. All New Hampshire civil causes begun in its District Courts, subject only to a monetary threshold tested by the claim value or by the counterclaim value (RSA 502-A:14 and 15), are "removable" from the District Court to the Superior Court with access to Trial by Jury, except "Summary Process" causes, irrespective of the monetary value of a defendant's counterclaim.

13. Said statutory classification scheme for dispossession adjudication remedy upon plaintiff's election, and denial of the Fundamental Right of access to Jury Trial to "Summary Process" class members, violates both the United States and the New Hampshire Constitutions; Plaintiff has preserved all Constitutional claim(s), and explicitly reserved his Federal claim(s) for this Cause, while asserting only his State of New Hampshire Constitutional and other claim(s) in the State Courts.

14. The State of New Hampshire was the ninth (9th) and pivotal State of the inchoate United States to ratify the

Constitution of the United States, and said New Hampshire's Constitutional jurisprudence, including its Constitutional civil jury trial provision, was subsumed within Amendment VII to the Constitution of the United States, which United States Constitutional civil jury trial provision, therefore, is binding upon the State of New Hampshire directly and/or through operation of Amendment XIV.

15. Said Defendants Vincola elected to initiate a "Summary Process Writ" pursuant to NH RSA 540:12 in the Plaistow District Court, Docket Number 96-LT-82; herein Plaintiff timely demanded Trial by Jury, which was not allowed. The Plaistow District Court, Hurd, P.J., entered an Order for possession, from which appeal was taken to the New Hampshire Supreme Court, asserting New Hampshire Constitutional and statutory infirmities in the proceeding, rulings and Order, including the denial of access to Trial by Jury (App. p. 3-4).

16. By Order sub die April 16, 1997, the New Hampshire Supreme Court, in Docket Number 97-145 Vincola v. Canty, "... declined" sub its Rule 7(1), herein Plaintiff's appeal, and by Order sub die May 20, 1997, has declined to Reconsider said "declination" or to Stay the operation thereof (App. pp. 1-2).

17. Plaintiff is at immediate and irreparable risk, harm and/or injury, for which he has no adequate remedy at law, of being wrongfully dispossessed due to the aforesaid New Hampshire judicial processes violative of, and deficient under, the U. S. Constitution, upon issuance of Writ of Execution without further Notice or Hearing by said Defendant LaRHETTE to said Defendants VINCOLA.

17(a). Plaintiff, through the allegations of this Verified Complaint and the companion "Memorandum In Support of... Emergency... TRO," has made out the very strong and high likelihood and probability of his ultimate success on the merits of his herein Claim(s).

17(b). Denial of Plaintiff's hereinafter Prayer(s) for equitable

and/or injunctive relief pendante lite may render Plaintiff's herein Constitutional claim(s) moot.

COUNT I

18. Plaintiff incorporates herein by express reference the allegations of Paragraphs Seven (7) through Seventeen-(b) [17(b)], supra.

19. Said Defendants Vincolas, with and upon the advice of private, licensed, legal Counsel throughout, are "state actors" acting "under color of state law," by their election to seek relief under the "Summary Process" remedy, and not the "Ejectment" remedy, and did so, and continued after Notice thereof, and the opportunity(ies) to amend their Writ accordingly, knowingly in order to deprive herein Plaintiff of access to Trial by Jury.

20. Defendants Vincola's said election constitutes violations of Plaintiff's U.S. Constitution Amendment V, VII and/or XIV rights to and expectations of access to Trial by Jury, Due Process of Law and/or Equal Protection of the Law, all to Plaintiff's great injury, damage and suffering.

20(a). Defendants Vincola's said election constitutes the knowing and malicious abuse of process.

COUNT II

21. Plaintiff incorporates herein by express reference the allegations of Paragraphs Seven (7) through Seventeen-(b) [17(b)], supra.

22. The State of New Hampshire's failure to afford Plaintiff access to Trial by Jury upon his Demand therefor in the Cause denominated as Plaistow District Court Docket Number 96-LT-82 violates Plaintiff's U.S. Constitution Amendments V and VII rights to and expectations of access to Trial by Jury for adjudication of Plaintiff's property interest(s), as said Amendments oblige New Hampshire directly and/or through the operation of Amendment XIV, all to Plaintiff's great injury, damage and suffering.

COUNT III

23. Plaintiff incorporates herein by express reference the allegations of Paragraphs Seven (7) through Seventeen-(b) [17(b)], supra.

24. The State of New Hampshire's "classification scheme" for real property possessory adjudication, whereby one (1) class is afforded the fundamental right of access to Trial by Jury and herein Plaintiff's "Summary Process" class is denied access to Trial by Jury, and Plaintiff's class "assignment" was determined solely and exclusively by the un-aided, "private," self-interest of Defendants Vincola, violates Plaintiff's rights to and expectations of Due Process and Equal Protection of the Law as guaranteed by U. S. Constitution Amendments V, VII and/or XIV, all to Plaintiff's great damage, injury and suffering.

COUNT IV

25. Plaintiff incorporates herein by express reference the allegations of Paragraphs Seven (7) through Seventeen-(b) [17(b)], supra.

26. New Hampshire Supreme Court Rule 7(1), under which said Court purported to "decline" appellate review of Plaintiff's clear and direct claim that a New Hampshire statute violates the New Hampshire Constitution, violates Plaintiff's U. S. Constitution Amendments V and/or XIV rights to and expectations of Due Process and Equal Protection of the Law on its face and/or as applied to herein Plaintiff, all to Plaintiff's great injury, damage and suffering.

RESERVATIONS:

27. Plaintiff hereby DEMANDS Trial by Jury hereof.

28. Plaintiff hereby reserves Leave to amend this Complaint, including, but not in limitation by specification, naming additional defendants sub Paragraph Fifth (5th), supra, denominating additional claim(s) for relief, and specification of additional element(s) of damage(s).

29. Plaintiff hereby reserves Leave to cause Entry of Appearance by Counsel.

30. Upon Appearance by Counsel, Plaintiff reserves Leave hereunder to amend this Verified Complaint sub Fed.R.Civ.P. 23 and Pray Class certification of all other New Hampshire "Summary Process" defendants similarly situate as herein Plaintiff.

31. Upon Appearance of Counsel, Plaintiff reserves Leave hereunder to amend this Verified Complaint sub Fed.R.Civ.P 23 and Pray Class certification of all other New Hampshire Constitutional claimants whose appeals have been "declined" sub New Hampshire Supreme Court Rule 7(1) similarly situate as herein Plaintiff.

PRAYERS FOR RELIEF

WHEREFORE all of the foregoing, and after Hearing, Trial and Verdict, Plaintiff respectfully Prays and Moves this Honourable Court:

(A) to DECLARE, pursuant to its authority sub 28 U.S.C. 2201, New Hampshire 1992 Session Laws, c. 284:45, codified as RSA 540:20, violative of the U. S. Constitution; and,

(B) to DECLARE, pursuant to its authority sub 28 U.S.C. 2201, New Hampshire Supreme Court Rule 7(1) per se and/ or as applied to Plaintiff's claims under the New Hampshire Constitution, violative of the U.S. Constitution; and

(C) in furtherance of its Jurisdiction hereof and pursuant to Fed.R.Civ.P. Rule 65, and pursuant to Plaintiff's Affidavit of Service of Notice hereof, ex parte without further Notice or Hearing, to RESTRAIN AND ENJOIN Defendants LaRHETTE and VINCOLAs from seeking, applying for, issuing, serving, and/or executing a Writ of Possession in or under Plaistow District Court Docket Number 96-LT-82, and/or otherwise seeking, causing and/or obtaining the dispossession of Plaintiff from the premises known as and numbered as Unit C-10, 19 Newton Road in said Plaistow, until further Order of this Honourable Court; and,

(D) after Hearing, to issue PRELIMINARY/ INTERIM

INJUNCTION, and after Trial, PERMANENT INJUNCTION, against the said Defendants for the Relief denominated in Paragraph (C), supra; and,

(E) after Trial, to ASSESS AND AWARD Plaintiff his damages, including punitive damages, his reasonable attorneys' fees, his attorneys' fees sub 42 U.S.C. § 1988, and his costs of suit; and,

(F) whatever other, further RELIEF Justice in the herein premises shall require.

_____
JOHN CANTY

SIGNED, SEALED, PUBLISHED, AND DECLARED AS AND FOR A VERIFIED COMPLAINT UNDER THE PAINS AND PENALTIES, INCLUDING PERJURY, AS IN LAW PROVIDED, EXCEPTING ONLY THOSE STATEMENTS MADE UPON INFORMATION AND BELIEF, AND AS TO THOSE, I BELIEVE THEM TO BE TRUE

THE STATE OF NEW HAMPSHIRE

_____, ss: May ___, 1997

Then personally appeared the above-named JOHN CANTY and made Oath that the foregoing was true, before me

_____, Notary Public

My Commission Expires: _____

Respectfully submitted,

_____

John Canty
Plaintiff in propria persona/pro se
Wshtn.Sq./POB 6346
Haverhill, MA 01831-6346
508.521.8888

DATED: MAY 22, 1997. ...u...1com...

The State Of New Hampshire

Supreme Court

In Case No. 97-145, L. David Vincola & a. v. John Canty, the court upon May 20, 1997, made the following order:

Defendant's motion for reconsideration is denied.
Defendant's Rule 27 application to extend time is denied.

Distribution:
Steven G. Brown, Esquire
Mr. John Canty
Attorney General
Clerk, Plaistow District Court 96-LT-82
Hon. Peter G. Hurd
Donna Nadeau, Supreme Court
File

Howard J. Zibel,

Clerk

The State Of New Hampshire

Supreme Court

In Case No. 97-145, L. David Vincola & a. v. John Canty, the court upon April 16, 1997, made the following order:

Defendant's motion for leave to file appendix is granted.
Defendant's application for suspension of Rule 7(1) requirements is granted to the extent that the notice of appeal shall be treated as timely filed.
Notice of appeal is declined. See Rule 7(1).
Plaintiffs' motion for summary affirmance is, therefore, moot.

Distribution:
Steven G. Brown, Esquire
Mr. John Canty
Attorney General
Clerk, Plaistow District Court 96-LT-82
Hon. Peter G. Hurd
Donna Nadeau, Supreme Court
File

Howard J. Zibel,
Clerk

SPECIFIC QUESTIONS TO BE RAISED ON APPEAL, EXPRESSED IN TERMS AND CIRCUMSTANCES OF THE CASE, BUT WITHOUT UNNECESSARY DETAIL.

1. Whether RSA 540:20, as amended by 1992 Session Laws, ch. 284:45, effective January 1, 1993, abrogating "appeal" to, and jury trial in, the Superior Courts, un-Constitutionally denies Canty and all other RSA ch. 540 Defendants, their right to Jury Trial under the New Hampshire Constitution, Part I, Article 20th:

"In all controversies concerning property,... the parties have a right to a trial by jury. This method of procedure shall be held sacred..."

2. Whether since 1993, RSA 540:20 violates the rights to and expectations of the protections contained in Articles 1st, 2nd, 12th, 14th and/or 15th of Part I of the New Hampshire Constitution, collectively referred to as "substantive due process of law and/or equal protection under law," of Canty and all other RSA ch. 540 Defendants, by depriving them of their right to jury trial, supra:

(a) when similarly situate RSA 509:6 (see RSA 540:26) Ejectment defendants, against whom identical possessory relief is sought, have the right without pre-condition to (first instance) jury trial; AND/OR,

(b) when the "classification" of otherwise similarly situated occupants as RSA 509:6 Ejectment (with jury trial) or as RSA ch. 540 Summary Process (denied jury trial) defendants is "made" solely by the un-trammeled, self-interest, election of private plaintiffs.

3.(a) Whether pendency in the Superior Court of the parallel "rent deficiency" cause of action, per this trial Court's Order five (5) days previous, requires or permits, upon Motion and sufficient compulsory counterclaim, removal/transfer of this RSA ch. 540 Writ sub RSA 502-A:14 III.(a).

3.(b) Whether upon a sufficient compulsory counterclaim, removal/transfer of an RSA ch. 540 Writ lies sub RSA 502-A:14 III.(b).

4. Whether, upon Plaintiff(s)' admission that they, or either of them, individually and/or as an un-registered RSA 305-A:1 "foreign partnership" doing business in New Hampshire, never registered the trade name "Blueberry Knoll Management" sub RSA ch. 349, requires that the amended "un-registered foreign partnership" Plaintiff(s)' Writ be dismissed sub RSA 305-A:4.

5. Whether the trial Court's denial of Canty's request for continuance of this Trial after the Hearing on December 10, 1996, rises, under all of the relevant circumstances, to an abuse of discretion.

6.(a) Whether the un-disputed timely tender to, receipt by, and retention of Canty's $450.00 payment by Plaintiff(s) constitutes compliance and "cure" sub RSA 540:9.

6.(b) Whether the simultaneous, or near simultaneous, service(s) on September 18, 1996, of Demand for September (sic) "rent" and Notice to quit comply with the "rent in arrears" limitation of RSA 540:8, and, the "prior to" requirements of RSA 540:4 and :5.

7. Whether the trial Court erred in neither granting nor denying, but denying by obvious implication, the benefit of the shifted "burden of proof" upon the rebuttable presumption of retaliation sub RSA 540:13-b.

8.(a) Whether the trial Court erred in "concluding" that Defendant had an obligation to pay $575.00 on or before September 18, 1996, as "rent."

8.(b) Whether the trial Court erred in ruling that Plaintiff(s)' receipt and retention of Canty's timely letter and $450.00 tender did not constitute "acceptance" and waiver of the September 18th Notices.

STATE OF NEW HAMPSHIRE
SUPREME COURT

CONCORD, ss: Docket No.: 97-145

L. David Vincola et a.,
Plaintiff(s),
v.
John Canty,
Defendant.

DEFENDANT'S SUP. CT. RULE 22 MOTION FOR RECONSIDERATION

COMES NOW your Defendant as above-captioned, John Canty, and respectfully Prays and Moves this Honourable Court, pursuant to Sup. Ct. Rule 22, to RECONSIDER that portion of its Order entered herein on April 16, 1997, to wit: "Notice of appeal is declined. See Rule 7(1).," as the operative provision of said Supreme Court Rule 7(1), "The supreme court may, in its discretion, decline to accept an appeal, or any question raised therein...," affronts the Constitution of the State of New Hampshire per se and/or as applied to this Cause.

I. Summary of Prior Proceedings.

This cause is an appeal from an Order for Judgment from the Plaistow District Court in an RSA ch. 540 Writ proceeding wherein Defendant asserts multiple errors of "State law," not here relevant, and denial of his asserted rights under the New Hampshire Constitution to jury trial. Defendant finds these Constitutional sources directly in Part I, Art. 20, and indirectly, (1) as a denial of his "Equal Protection of the Law" and/or "Substantive Due Process of Law," by provision of jury trial to RSA 509:6 ("Ejectment") defendants, but denying said Constitutional right to your RSA ch. 540 Defendant, and, (2) by the statutory vesting of the prerogative to confer or deny

jury trial upon the class of "possessory plaintiffs."

It is well noted that this Honourable Court might have further increased the upward slope of this Defendant's Constitutional quest by summarily or otherwise affirming the Order of the trial Court, or compounded his travail with the hurdle of "late filing;" that this Honourable Court has permitted and preserved the "purity" of the Constitutional inquiry obliges your Movant to present it first with the ensuing new, threshold, Constitutional argument, occasioned by its "declination."

Defendant has scrupulously heretofore, and continues herein, to reserve all claims and/or theories pursuant to the Constitution of the United States, while recognizing that this Honourable Court is not similarly bound by Defendant's reservation(s).

II. Argument.

The Constitution of New Hampshire, Part second (2nd), Article 73-a, provides:

"The chief justice... shall, with the concurrence of a majority..., make rules governing... the practice and procedure to be followed... The rules so promulgated shall have the force and effect of law. (emp.add.)."

Thus, the "discretionary declination" provision of Sup. Ct. Rule 7(1) has attained that force associated with "legislative enactment," and must be subject to administration according to the same scrutiny, strictures and standards otherwise applicable to other "laws," including its harmony with companion Constitutional provisions, particularly, Part II, Article 5th:

"... to make, ordain, and establish... orders, *laws*... so as the same *be not repugnant or contrary to this constitution*... (*emp.add.*)."

Article fifth (5th) intends the mandate of and the limitation upon the General Court; and by its Constitutional stature, this Honourable Court's rule-making prerogative sub Article 73-a avoids any potential "separation/delegation" issues.

It is not possible, however, to construe "law" promulgated

sub Part II, Article 73-a, as free of the constraint(s) of "laws" promulgated sub Part II, Article 5th; each is of companion and equal Constitutional moment. While this Honourable Court shall announce whether Constitutional harmony or violation has occurred in any instance, it may not itself, under its "law," act in Constitutional dis-harmony.

It lies virtually beyond the necessity for citation in Constitutional analysis that "standard-less discretion" is virulently suspect as, if not virtually per se, violative of the twin doctrines of "Equal Protection" and "Substantive Due Process." The shroud and mystique cloaking this Honourable Court's determinations sub Rule 7(1) must yield to a Constitutional review according to the identical standards which would be applied to a "mere" statute: such is the Constitutional consequence of "... the force and effect of law."

Movant argues that, on the facts of this Cause, such consequence is clearly consonant with the New Hampshire Constitution, e.g.:

"... Nor are the inhabitants of this state controllable by any other laws than those to which they, or their representative body, have given their consent. (Art. 12th, Part I)."

"... to obtain right and justice freely... completely, and without any denial... conformably to the laws. (Art. 14th, Part I)."

"... No subject shall be... despoiled or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land;... (Art. 15th, Part I)."

Your Movant has Prayed this Honourable Court "answer" a question only it - The Supreme Court of the State of New Hampshire - is "constituted" to answer: whether a statute enacted by the New Hampshire General Court conflicts with the Constitution of the State of New Hampshire. To deny its Citizenry "Constitutional answers" is itself a violation of the

Constitution of the State of New Hampshire, and Rule 7(1) of this Honourable Court, facially and/or as applied to this and other appeals asserting New Hampshire Constitutional issues, violates your Movant's rights to and expectations of "Equal Protection" and "Due Process of Law" secured by the New Hampshire Constitution.

WHEREFORE your Movant respectfully Prays and Moves this Honourable Court, for all of the foregoing:

(A) that the Relief first above Prayed accordingly be Granted; and,

(B) alternatively, that your Movant be granted twenty-one (21) days within which to submit a Memorandum not in excess of twenty (20) pages in further support hereof; and,

(C) that this Honourable Court enter whatever other, further, Relief Justice in the herein premises shall require.

CERTIFICATE OF SERVICE

The undersigned hereby Certifies that he has Served the foregoing and the companion "... Application To Extend Time" upon the Office of the Clerk, Plaistow District Court, Steven G. Brown, Esq., 15 High Street, Manchester, NH 03101-1628, and Stephen J. Judge, Esq., Office of the Attorney General, at least by postage pre-paid first class mail, all on this _____ day of April, 1997.

Respectfully submitted,

_____

John Canty
Defendant pro se
Moving Party in Supreme Court
Wshtn.Sq./POB 6346
Haverhill, MA 01831-6346
508.521.8888

DATED: APRIL 25, 1997. (...82ZR...)

STATE OF NEW HAMPSHIRE
SUPREME COURT

CONCORD, ss: Docket No.: 97-145

L. David Vincola et a.,
Plaintiff(s),

v.

John Canty,
Defendant.

DEFENDANT'S SUP. CT. RULE 27 APPLICATION TO EXTEND TIME

COMES NOW your Defendant as above-captioned, JOHN CANTY, and respectfully Prays and Moves this Honourable Court, pursuant to Sup.Ct. Rule 27, that in the event of determination of the companion "...Motion For Reconsideration," of even date and filed simultaneously herewith, adverse to your Movant's Prayer(s), that the time prior to the issuance of the Order or Mandate sub Sup. Ct. Rule 24 be enlarged for and until fifteen (15) days thereafter in order to permit your Movant to initiate further (Constitutional) review.

WHEREFORE your Movant respectfully Prays and Moves this Honourable Court:

(A) that the Relief first above Prayed be Granted; and,

(B) that this Honourable Court enter whatever other, further, Relief Justice in the herein premises shall require.

CERTIFICATE OF SERVICE

Please see Certificate of Service with companion "...Motion For Reconsideration" of even date and filed simultaneously herewith.

Respectfully submitted,

John Canty
Defendant pro se
Moving Party in Supreme Court

Wshtn.Sq./POB 6346
Haverhill, MA 01831-6346
508.521.8888

DATED: APRIL 25, 1997.

(...821E...)

STATE OF NEW HAMPSHIRE
SUPREME COURT

CONCORD, ss:

Docket No.:
97-145

L. David Vincola et a.,
Plaintiff(s),
v.
John Canty,
Defendant.

MOTION TO STAY

COMES NOW your Defendant as above-captioned, John Canty, and respectfully Prays and Moves this Honourable Court, pursuant to RSA 527:1 ("When Issued. No execution shall issue until the expiration of the appeal period."), to STAY the issuance of any further proceedings herein by the Plaistow District Court, including issuance of any Writ of Possession.

As reasons herefor, your Defendant respectfully represents, avers and says as follows:

1. The aforesaid RSA 527:1 language, "... until the expiration of the appeal period.," contemplates the time within which appeal to the United States Supreme Court might be effected upon a "final judgment" of this Honourable Court, as Entered herein, pursuant to denial of Reconsideration, on May 20, 1997.

2. Said appeal from this Honourable Court's "final judgment" lies pursuant to Title 28, U.S.C. § 1257, and the time permitted within which to perfect such appeal, unless extended, as provided sub 28 U.S.C. § 2101(c) is ninety (90) days. This parallel time period similarly may be found in RSA 540:13-c ("... the court may order the tenant shall not be dispossessed until a date not later than 3 months...").

3. In addition to the mandate and the authority of RSA 527:1 and/or 540:13-c as aforesaid, 28 U.S.C. § 2101(f) provides:

"... the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party

aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court...(emp.add.)."

4. By Order of June 5, 1997, the Plaistow District Court, Hurd, P.J., Denied (App.) your Movant's "Motion To Stay."

5. As described in your Movant's "Motion For Reconsideration" filed May 27, 1997, and denied on May 28th, a federal Constitutional litigant who has reserved his federal Constitutional claims may, upon the "adverse determination ("declined") not rooted in federal Constitutional law by this Honourable Court, seek further remedy sub 28 U.S.C. § 2001, inter alia, and seek appellate review from the United States Supreme Court by certiorari as aforesaid.

WHEREFORE all of the foregoing, your Movant respectfully Prays and Moves this Honourable Court:

(A) that the Relief first above Prayed, a STAY of proceedings below, may Enter; and,

(B) that this Honourable Court enter whatever other, further, Relief Justice in the herein premises shall require.

CERTIFICATE OF SERVICE

The undersigned hereby Certifies that he has Served a copy of the foregoing each upon the Office of the Clerk, Plaistow District Court, Steven G. Brown, Esq., 15 High Street, Manchester, NH 03101-1628, and Stephen J. Judge, Esq., Office of the Attorney General, at least by postage pre-paid first class mail, all on this _____ day of June, 1997.

Respectfully submitted,

_____

John Canty (/) Defendant pro se
Moving Party in Supreme Court
Wshtn.Sq./POB 6346
Haverhill, MA 01831-6346
508.521.8888

DATED: JUNE 7, 1997. (...82$F...)

The State Of New Hampshire

Supreme Court

In Case No. 97-145, L. David Vincola & a. v. John Canty, the court upon June 10, 1997, made the following order:

Defendant's motion to stay is denied.

Distribution:

Steven G. Brown, Esquire
Mr. John Canty
Attorney General
Clerk, Plaistow District Court 96-LT-82
Honorable Peter G. Hurd
Donna K. Nadeau, Supreme Court
File

Howard J. Zibel,

Clerk

BEST

The State of New Hampshire

Rockingham COUNTY | Plaistow District COURT

96-LT-82 NO.

LANDLORD AND TENANT WRIT

DEFENDANT EXHIBIT 5

L. David Vincola
PLAINTIFF
20 Grapevine Rd.
ADDRESS
Wenham, Ma., 01984

v.

John Canty
DEFENDANT
19 Newton Road Apt. C-10
ADDRESS
Plaistow, N.H. 03865

To the Sheriff of any County or to his Deputy or to any Law Enforcement Officer:

WE COMMAND YOU TO SUMMON: John Canty
of 19 Newton Rd., Apt. C-10, Plaistow in the county of Rockingham
if found in your precinct, to appear at the Plaistow District Court
court at Plaistow in said county of Rockingham
on Oct. 26, ,19 96 ,at 9:00 (A.M./P.M. to answer Plaintiff(s).

In a plea wherein the Plaintiff(s) complain that on the date of this Writ they are entitled to possession of premises situated in 19 Newton Rd., Apt. C-10, Plaistow, N.H.
and described as follows:
2 bedroom apt., lower right of bldg. C

with the appurtenances, now occupied by the Defendant(s), and that the said Defendant(s) on the 18th day of Sept. ,19 96 , were duly notified in writing by the said Plaintiff(s) to quit and deliver up possession of the same on the 26th day of Sept. ,19 96 , yet said Defendant(s) have continued and still are in possession of said premises without right.

WITNESS, HONORABLE EDWIN W. KELLY, Administrative Justice of the District and Municipal Courts.

this 15 day of Sept. ,19 96 .

Clerk of Court

IMPORTANT NOTICE

You do not have to physically appear in Court on the day specified in these papers since there will be no hearing on that day. However, if you desire to be heard on the matters raised in these papers, you must notify the Court by filing an appearance with the Clerk of Court on or before the date specified on this writ. (Appearance forms are available at the Clerk's Office.) A date for a hearing will then be set by the Court and you will be notified by mail. If you fail to file an appearance form a default judgment may be entered against you, and a writ of possession may be issued.

A TRUE COPY: ATTEST

DEPUTY

INDORSED BY L. David Vincola

SIGNATURE Nancy L. Vincola, L. David Vincola
NAME
20 Grapevine Rd.
ADDRESS
Wenham, Ma. 01984 (508) 468-1495
PHONE

AOC-220-043-1/93

VAILABLE COPY

(STAMP: "24-HOUR DEPOSITORY/FILED/
Feb 7 10 40 PM '96")

**IN THE UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NEW HAMPSHIRE**

CONCORD, ss:

Civil Action Number
(REMOVAL):

_____

L. DAVID VINCOLA,
Plaintiff,

v.

JOHN CANTY,
Defendant.

PETITION FOR REMOVAL

TO THE HONOURABLE THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE:

Respectfully Represents your Petitioner-Defendant as above-captioned, John Canty, as and for Petition for Removal as follows:

PARTIES

1. The Plaintiff as above-captioned, L. David Vincola, a

Citizen and/or resident of the Commonwealth of Massachusetts, of Twenty (20) Grapevine Road, Wenham in the County of Essex, purports to own and to be vested with title to a commercial, non-owner-occupied, thirteen (13) unit, residential rental housing facility consisting of four (4) buildings, three (3) of which each contain four (4) apartment units, known collectively as "Blueberry Knoll" and situated in the Town of Plaistow, County of Rockingham, State of New Hampshire.

2. The Defendant as above-captioned, John Canty, a Citizen and/or resident of the State of New Hampshire, entered into a written agreement with the Plaintiff concerning Canty's occupancy of Unit Ten (10) in Building "C" commencing on or about November 1, 1994, and his occupancy thereof continues.

JURISDICTION

3. This Honourable Court is vested with Jurisdiction over this Defendant's herein Removal Petition pursuant to Title 28, U.S.C. § 1441(b) ("Federal Question Removal") and/or (a) ("Diversity of Citizenship Removal") as if originally instituted here, Title 42, U.S.C. § 1983 ("Deprivation of Constitutional Rights"), Title 28, U.S.C. § 1443(l) ("Denial of Constitutional Rights '... to all persons within the jurisdiction...' of New Hampshire similarly situate"), and/or Title 28, U.S.C. § 2201 ("Declaratory Judgment"), all of the foregoing statutory citations et seq.

4. The action as above-captioned sought to be Removed hereby is pending in the Plaistow District Court, Town of Plaistow, County of Rockingham, New Hampshire, Docket Number 96-LT-00007; this Honourable United States District Court for the District of New Hampshire is the District and Division embracing said New Hampshire State Court.

FACTS ATTENDANT UPON REMOVAL

5. On or about January 24, 1996, Plaintiff caused Defendant to receive the single-page, two-sided, document denominated "Landlord and Tenant Writ," as annexed hereto (each side) and marked "A" and "B" by which Defendant was purportedly obliged to Appear or Default on or before February 2, 1996, whether or not Plaintiff shall have "Entered" said Writ, and in whatever form, or not; Defendant "Appeared" without submitting to the Jurisdiction of the Plaistow District Court per annex "C." No further proceeding(s) has obtained in said Court, but Trial has been calendared for February 13, 1996, per Notice sub die February 5th.

6. The reverse side of said Writ, annex "B" hereof, purports to provide "INFORMATION FOR TENANT" as mandated by New Hampshire Revised Statutes Annotated (hereinafter "RSA") 540:13, II, and as such, constitutes "State Action" as said expression is used for Constitutional Equal Protection and/or Due Process, whether substantive and/or procedural, analyses.

7. Said "Information" fails to disclose, indeed tends to induce the contrary belief and reliance thereupon and/or chills the exercise of: (a) the availability, whether as a matter of right pursuant to Amendment Seventh (7th) of the United States Constitution 1/, and/or Article Twentieth (20th) of the New Hampshire Constitution 2/, and/or sub RSA 502-A:14, III., upon the sufficiency of any compulsory counterclaim, of **Trial by Jury**; and/or, (b) the propriety of seeking, and the risk(s) attendant upon declination to seek, the assistance of legal Counsel in the formulation of Defense(s) to said Writ.

1/ Pernell v. Southall Realty, 416 U.S. 363, 94 S.Ct. 1723, 40 L.Ed.2d 198 (1974).

2/ cf. McElroy v. Gaffney, 129 NH 382, 529 A.2d 889 (1987).

8. The sovereign State of New Hampshire, having gratuitously undertaken to "inform" tenant-defendants of their respective rights in the premises through Legislative enactment, must discharge said duty in a "neutral" manner, including at a minimum, that the aforesaid "Information For Tenant" is not exhaustive of all rights the Tenant may have in said premises.

9. The real, inevitable and/or palpable consequence(s) of the less than complete, non-exhaustive nor expressly limited "Information For Tenant" is to induce reliance upon the **apparent absence of a Jury remedy under any circumstances**, which is not true, and/or to penalize or chill those tenant-defendants less affluent and/or legally prudent from seeking same with the assistance of legal Counsel.

10. Whatever legislative purpose(s) may lie behind RSA 540-13,II., the explicit and/or implicit intention to chill or reduce, and/or the actual effect of chilling or reducing, the exercise of the claim to Trial by Jury is Constitutionally impermissible.

DEMAND FOR JURY TRIAL

11. Petitioner-Defendant hereby Claims and Demands Trial by Jury.

RESERVATIONS AND OTHER MATTERS

12. Petitioner-Defendant hereby expressly reserves his right to raise all defenses and/or objections and/or to otherwise plead or amend this Petition and/or other pleading(s) subsequent to the Removal of this Cause to the Jurisdiction of this Honourable Court. Petitioner additionally reserves his right to move pursuant to F.R.Civ.P. Rule 23 to certify this cause as a class action.

13. Petitioner-Defendant Prays waiver of any surety upon his bond and waiver of any bond as same may heretofore have

been required pursuant to 28 U.S.C. 1446(d), but is no longer, by amendment thereof, at variance with this Honourable District Court Local Rule Twenty-Fourth (24th).
14. A true copy of this Petition for Removal will be filed with the Office of the Clerk of said Plaistow District Court, and the Plaintiff will be given written Notice of the filing hereof, all as required sub 28 U.S.C. § 1446(d).
14-A. Additionally, a true copy of this Petition shall be delivered to the Office of the Attorney General of the State of New Hampshire, and his endorsement of a receipt therefor shall be requested.

PRAYERS FOR RELIEF

WHEREFORE all of the foregoing, your Petitioner respectfully Prays, Moves and Demands as and for Relief as follows:

(A) That this Cause shall be Removed to the Docket of this Honourable United States District Court for the District of New Hampshire for all further proceedings, and shall proceed to Judgment as if said Cause were originally instituted therein; and,
(B) That this Honourable Court declare said RSA 540:13,II., violative of the Due Process, Equal Protection, and/or Privileges and Immunities provisions and protections of the Constitution of the United States embodied explicitly within, or held to be obligatory upon, the several States through Amendment Fourteenth (14th), not in limitation by specification, including Amendments Fifth (5th) and/or Seventh (7th); and,
(B-1) That this Honourable Court enjoin the several Sheriffs and their Deputies sworn to service in the State of New Hampshire against the execution of any Judgment of Possession against any tenant-defendant issued upon a

Constitutionally-violative Writ and Summons sub RSA 540:13, II., as determined by this Honourable Court in (B), supra.

(C) That this Honourable Court proceed with the Constitutional ajudication Prayed herein as a Declaratory Judgment cause pursuant to said 28 U.S.C. § 2201 and F.R.Civ.P. Rule 57;

(D) That this Honourable Court enter Judgment after Trial by Jury in favour of your Petitioner in the amount of his actual, compensatory, and/or nominal damage, to be added thereto any exemplary damages which may lie, his costs and reasonable attorneys' fees pursuant to relevant statutory authority(ies).

CERTIFICATE OF SERVICE

The undersigned hereby Certifies under the Pains and Penalties as in Law provided that he has Served a photocopy of the foregoing Petition For Removal upon the Plaintiff L. David Vincola, Twenty (20) Grapevine Road, Wenham, MA 01984, first class postage pre-paid, promptly after the filing hereof, and discharged, or will discharge, his other Service and/or Notice duties per Paragraphs 14 and 14-A, supra, likewise promptly.

Respectfully submitted,

OF COUNSEL:

_____

Maureen Kerrigan, Esq.
(Not admitted in NH)
Newton Rd./POB 542
Plaistow, NH 03865
603.382.6833

_____

John Canty
Defendant *pro se*
Wshtn.Sq./POB 6346
Haverhill, MA 01831-6346
508.521.8888

DATED: FEBRUARY 7, 1996.

United States District Court For The District Of New Hampshire

Vincola

v. Civil Action No. 1:96-cv-00066-B

Canty

PROCEDURAL ORDER FOR REMOVED ACTIONS

The above case was removed to the United States District Court and has been assigned to Judge Paul J. Barbadoro (SIC)

In addition to the required filings outlined in Local Rule 81.1 (outstanding pending motions, certified copy of the State Court record) it is ORDERED that:

Defendant(s) shall file an answer or present other defenses or objections available under the Federal Rules of Civil Procedure within twenty (20) days from the date of this order. If such answer has been previously been (SIC) filed in State Court, it shall be refile (SIC) separately from other State Court pleadings and captioned "Answer".

By the Court,
/s/ (ILLEGIBLE)
Deputy Clerk
United States District Court

Date: February 12, 1996

cc:

L. David Vincola,
John Canty

The State of New Hampshire

Rockingham COUNTY | Plaistow District COURT

96-LT-07 NO.

LANDLORD AND TENANT WRIT

L. David Vincola PLAINTIFF v. John Canty DEFENDANT

20 Grapevine Road ADDRESS

Wenham, Ma., 01984

19 Newton Rd., Apt. C-10 ADDRESS

Plaistow, N.H. 03865

To the Sheriff of any County or to his Deputy or to any Law Enforcement Officer:

WE COMMAND YOU TO SUMMON: John Canty of 19 Newton Rd, Apt. C10, Plaistow in the county of Rockingham if found in your precinct, to appear at the Plaistow District court at Plaistow, N.H. in said county of Rockingham on February 2, 19 96, at 9:00 (A.M.) P.M. to answer Plaintiff(s).

In a plea wherein the Plaintiff(s) complain that on the date of this Writ they are entitled to possession of premises situated in 19 Newton Rd, Apt C10, Plaistow and described as follows:

2 bedroom, first floor, lower right

with the appurtenances, now occupied by the Defendant(s), and that the said Defendant(s) on the January 11th day of , 19 96, were duly notified in writing by the said Plaintiff(s) to quit and deliver up possession of the same on the 19th day of January, 19 96, yet said Defendant(s) have continued and still are in possession of said premises without right.

WITNESS, HONORABLE EDWIN W. KELLY, Administrative Justice of the District and Municipal Courts.

this 22nd day of January, 19 96.

James M. LaPlatte

Clerk of Court

IMPORTANT NOTICE

You do not have to physically appear in Court on the day specified in these papers since there will be no hearing on that day. However, if you desire to be heard on the matters raised in these papers, you must notify the Court by filing an appearance with the Clerk of Court on or before the date specified on this writ. (Appearance forms are available at the Clerk's Office.) A date for a hearing will then be set by the Court and you will be notified by mail. If you fail to file an appearance form a default judgment may be entered against you, and a writ of possession may be issued.

A TRUE COPY; ATTEST

DEPUTY SHERIFF

INDORSED BY L. David Vincola SIGNATURE

L. David Vincola NAME

20 Grapevine Rd. ADDRESS

Wenham / Ma. 01984

PHONE (508) 468-1495

AOC 230-045-1/93

Plaistow District Court

145 MAIN STREET
P.O.BOX 129 96-LT-07
PLAISTOW, NH 03865 Docket No.

ORDER ON DOCUMENT NO. _____

L.David Vincola v John Canty_____
In accordance with United States Code #1446 d (SIC), until this matter is remanded by the United States District Court all matters concerning 96-LT-07 are stayed.

March 7, 1996_ (Stamp)Peter G. Hurd__
Date Signature
Presiding Justice

cc: L. David Vincola Brian Germaine, Esq.
John Canty

(STAMP)
FILED
Mar 18 9 40 AM '96

United States District Court
For The District Of New Hampshire

L. David Vincola

v. Civil No. 96-066-B

John Canty

ORDER

This case concerns a landlord-tenant dispute. It does not involve a "claim or right arising under the Constitution, treaties, or laws of the United States." 28 U.S.C.A. (SIC) § 1441(b). Further, because defendant is a resident of the state in which the action was brought, it is not removable on any other basis. Id. Accordingly, the case is remanded to the Plaistow District Court. Plaintiff's request for an award of expenses and attorney fees is denied.

SO ORDERED.

/s/
Paul Barbadoro
United States District Judge

March (Script: 15), 1996

cc: Brian Germaine, Esq.
John Canty, pro se

United States Court of Appeals
For The First Circuit

No. 96-1438

L. DAVID VINCOLA,
Plaintiff, Appellee,
v.
JOHN CANTY,
Defendant, Appellant.

Before

Selya, Cyr and Boudin,
Circuit Judges.

ORDER OF COURT

Entered June **26** , 1996

To the extent we have jurisdiction to review the district court's order remanding the case to state court, 28 U.S.C. § 1447(d), we affirm the order because the case was clearly not removable under 28 U.S.C. § 1443. Georgia v. Rachel, 384 U.S. 780, 792 (1966). Because this appeal is frivolous, we grant appellee's motion for attorney's fees and award $640.00 under Fed. R. App. P. 38.

Affirmed. Loc. R. 27.1.

By the Court:
(STAMP) JANICE M. O'NEIL
Clerk.

(cc: Messrs. Germaine, Canty & Ms. Kerrigan)

Plaistow District Court

145 MAIN STREET — 96-LT-07
P.O.BOX 129 — 96-LT-13
PLAISTOW, NH 03865 — Docket No.

ORDER ON DOCUMENT NO. _____

L. David Vincola v John Canty

The Defendant's Motion to Dismiss case #96-LT-07 for failure to comply with RSA 940 (SIC) :12 is Granted. Plaintiff's Voluntary Non-Suit on case #96-LT-13.

September 10, 1996 — (Stamp) Peter G. Hurd
Date — Signature
Presiding Justice

cc: L. David Vincola
John Canty Brian Germaine, Esq.

Plaistow District Court

145 MAIN STREET — 96-LT-13
P.O.BOX 129 — 96-LT-07
PLAISTOW, NH 03865 — Docket No.

ORDER ON DOCUMENT NO. _____

L. David Vincola v John Canty

The Defendant's Motion For Entry of Judgment and Assessment Of Damages is granted as follows:
The courts order of September 10, 1996, Plaistow District Court case 96-LT-07 and 96-LT-13 is amended to enter the Plaintiff's Involuntary Non-Suit in case 96-LT-13. The Defendant is awarded costs in accordance with RSA 540:15 in the amount of $123.00.

(Hand) 12-11-96 — (Stamp) Peter G. Hurd
Date — Signature
Presiding Justice

cc: John Canty
L. David Vincola Steven G. Brown, Esq.

United States Code

(Extracts):

28 U.S.C. § 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States. [Pub.L. 96-486, 94 Stat. 2369 (1980)].

28 U.S.C. § 1343. Civil rights and elective franchise

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

(b)... [Pub.L. 96-170, 93 Stat. 1284 (1979)].

28 U.S.C. § 2201. Creation of remedy

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes..., or in any civil action

involving an antidumping or countervailing duty proceeding ..., any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.
(b)... [Pub.L. 103-182, 107 Stat. 2147 (1993)].

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. [Pub.L. 104-317, 110 Stat. 3853 (1996)].

New Hampshire Revised Statutes

(Extracts):

509:3 Direction. Writs returnable to the supreme or superior court shall be directed to the sheriff of any county or his deputy; provided, however, that writs of attachment shall be directed to the sheriff, the plaintiff, his attorney or any other person. [1971 Session Laws Ch. 519, § 4 (1977)].

509:6 Real actions. In real actions and actions of ejectment, the original writ shall be summons or attachment only. [R.L. ch. 386, § 6 (1948)].

540:13 Writ; Service. A writ of summons may be issued, returnable before a municipal court, setting forth in substance that the plaintiff is entitled to the possession of the demanded premises, and that the defendant is in possession thereof without right, after notice in writing to quit the same, which writ shall be served seven days before the return day thereof. (Superseded/repealed, 1992 Session Laws c. 284, § 45, effective January 1, 1993.)

540:13 Writ; Service...

...

II. The writ...

...

(d) If the tenant wishes to appeal the district court's decision, he must:

(1) File a notice of intent to appeal with the district court within 7 days of the notice of the district's (sic) decision; and

(2) File a notice of appeal in the supreme court within 30 days of the notice of the district court's decision; and

(3) Pay all rent, as it comes due...

III. The writ of summons and the notice provided in paragraph II shall be served no less than 7 days before the return day set forth in the writ.

... (1992 Session Laws ch. 284, § 45, effective January 1, 1993.)

540:20 Appeal. A party aggrieved by the judgment of a municipal court upon issue joined in such case may, within three days after the rendition of the judgment, appeal therefrom. (Superseded/repealed, 1992 Session Laws c. 284, § 45, effective January 1, 1993.)

540:21 —Procedure on. The party appealing shall produce certified copies of the whole case at the court appealed to at the next return day, and either party may there offer evidence as if the cause had been originally begun therein. (Repealed, August 19, 1995).

540:20 Appeal. Any party to an action brought pursuant to this chapter shall, within 7 days of the notice of judgment date, file in the district court notice of intent to appeal to the supreme court. Said appeal shall otherwise be filed in accordance with supreme court rule. In all other respects, the judgment of the district court shall be final at the expiration of the appeal period. (1992 Session Laws ch. 284, § 45, effective January 1, 1993.).

540:26 Other Remedies. Nothing in this chapter shall be construed to prevent a landlord from pursuing his legal remedy at common law. [RS 209:22 (1842)].

New Hampshire Supreme Court Rules

(Extracts):

RULE 3. DEFINITIONS

...

"Appeal": Appellate review of rulings adverse to a party, after a final decision on the merits in a lower court.

...

"Declination of acceptance order": The supreme court does not deem it desirable to review the issues in a case, as a matter of sound judicial discretion and with no implication whatever regarding its views on the merits.

...

(Amended... September 1, 1987.).

RULE 7. APPEAL FROM LOWER COURT DECISION ON THE MERITS

(1) The supreme court may, in its discretion, decline to accept an appeal, or any question raised therein, from a lower court after a decision on the merits, or may summarily dispose of such an appeal, or any question raised therein, as provided in Rule 25. ...
(Amended... September 1, 1987.).

RULE 25. SUMMARY DISPOSITION

(1) The supreme court may at any time, on its own motion and without notice or on such notice as it may order, dispose of a case, or any question raised therein, summarily. An order of summary affirmance under this rule may be entered when (a) no substantial question of law is presented and the supreme court does not disagree with the result below, or (b) the case includes the opinion of the lower court, which identifies and discusses the issues presented and with which the supreme court does not disagree, or (c) the case includes the decision of the administrative agency..., or (d) other just cause exists for summary affirmance, in which case the order shall contain a succinct statement of the reason for affirmance. An order of summary dismissal under this rule may be entered when the supreme court has not considered the merits, because the court clearly lacks jurisdiction, or other just cause for summary dismissal exists, in which case the order shall contain a succinct statement of the reason for dismissal. An order of summary reversal may be made by the supreme court under this rule for just cause and the order shall contain a succinct statement of the reason therefor.

(2)...

(5) Cases summarily disposed of under this rule shall not be regarded as establishing precedent or be cited as authority.
(Amended... September 1, 1987).